88-327

No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

BUDDY ROEMER, in his capacity as Governor of the State of Louisiana; FOX McKEITHEN, in his capacity as Secretary of State of Louisiana; and JERRY M. FOWLER, in his capacity as Commissioner of Elections of the State of Louisiana,

Petitioners,

versus

RONALD CHISOM, MARIE BOOKMAN, WALTER WILLARD, MARK MORIAL, LOUISIANA VOTER REGISTRATION/EDUCATION CRUSADE, and HENRY A. DILLON, III,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

1. Did Congress intend the word "representatives" as used in the Voting Rights Act of 1965, § 2(b) as amended, 42 U.S.C. § 1973, to include judges who are selected by a state judicial electoral process?

LIST OF PARTIES

The parties to the proceedings below were:

The Petitioners:

EDWIN W. EDWARDS, in his capacity as Governor of the State of Louisiana; sub nom BUDDY ROEMER

JAMES H. BROWN, in his capacity as Secretary of the State of Louisiana; sub nom FOX McKEITHEN

JERRY M. FOWLER, in his capacity as Commissioner of Elections of the State of Louisiana

The Respondents:

RONALD CHISOM

MARIE BOOKMAN

WALTER WILLARD

MARC MORIAL

LOUISIANA VOTER REGISTRATION/ EDUCATIONAL CRUSADE

[a non-profit corporation comprised of Orleans Parish black registered voters active in voting rights issues. On information and belief, petitioners assert that this corporation has no parent, subsidiaries or affiliates.]

HENRY A. DILLON, III

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BUDDY ROEMER, in his capacity as Governor of the State of Louisiana; FOX McKEITHEN, in his capacity as Secretary of State of Louisiana; and JERRY M. FOWLER, in his capacity as Commissioner of Elections of the State of Louisiana,

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RONALD CHISOM, MARIE BOOKMAN, WALTER WILLARD, MARK MORIAL, LOUISIANA VOTER REGISTRATION/EDUCATION CRUSADE, and HENRY A. DILLON, III,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, BUDDY ROEMER, in his capacity as Governor of the State of Louisiana; FOX McKEITHEN, in his capacity as Secretary of State of Louisiana; and JERRY M. FOWLER, in his capacity as Commissioner of Elections of the State of Louisiana, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on February 29, 1988. A timely application for rehearing was denied on May 27, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 839 F.2d 1056, and is reprinted in the Appendix hereto, App. 4, *infra.*

Denial of the Petition for Rehearing by the Fifth Circuit is unreported. It is reprinted in the Appendix hereto, App. 27, *infra.*

The opinion of the District Court for the Eastern District of Louisiana is reported at 659 F.Supp. 183, and is reprinted in the Appendix hereto, App. 28, *infra.*

———o———

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. §§ 1331 and 1343 and 42 U.S.C. § 1973C, respondents brought this suit in the Eastern District of Louisiana on May 1, 1986. The respondents sought declaratory and injunctive relief under 42 U.S.C. §§ 1973 and 1983, as well as 28 U.S.C. §§ 2201 and 2202. The complaint was amended on September 30th, 1986.

A motion by petitioners to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure was filed on March 18, 1987. The district court granted the motion to dismiss on May 1, 1987, amended July 10, 1987, 659 F.Supp. 183 (E.D.La 1987). App. 28, *infra.*

On May 7, 1987, respondents appealed this dismissal to the United States Court of Appeals for the Fifth Circuit. On February 9, 1988 the dismissal decision of the district court was reversed and the case was remanded, 839 F.2d 1056 (5th Cir. 1988). App. 4, *infra.* Rehearing was denied May 27, 1988. App. 27, *infra.*

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

———o———

STATUTES INVOLVED

The following constitutional and statutory provisions involved have been printed in the Appendix.

United States Statutes:

Voting Rights Act
42 U.S.C. § 1973

Louisiana Constitution:

Judicial Branch
Article 5
Sections 3 and 4

Louisiana Revised Statutes:

Supreme Court District; justices
R.S. 13:101

———o———

STATEMENT OF THE CASE

Respondents brought this suit in the United States District Court for the Eastern District of Louisiana on behalf of all black registered voters in Orleans Parish, approximately 135,000 people. The suit challenged the at-large election of two justices to the Louisiana Supreme Court from the parishes of Orleans, St. Bernard, Plaquemines and Jefferson as being in violation of the 1965 Voting Rights Act, as amended, because of alleged dilution of the voting strength of the respondents. The action was for declaratory and injunctive relief, 42 U.S.C. §§ 1973 and 1983. Jurisdiction in the district court was asserted under 28 U.S.C. §§ 1331 and 1343 as well as 42 U.S.C. § 1973C. Respondents also sought relief under 28 U.S.C. §§ 2201 and 2202. Respondents sought the division of the First Supreme Court District into two districts, one to be comprised of the parishes of Jefferson, Plaquemines and St. Bernard and the other of Orleans Parish where blacks constituted 51.6% of the registered voters.

Petitioners filed a Fed.R.Civ.P. 12(b)(6) motion to dismiss for the failure of the respondents to state a claim upon which relief could be granted. The district court agreed with petitioners' contention that it was not the intention of Congress to apply the word "representatives" in Section 2 of the Voting Rights Act, as amended, to embrace members of the judiciary. The district court drew a distinction between the impartial functions performed by the judiciary without a constituency and the functions performed by the representatives who are not expected to be impartial but rather reflective of the needs and wishes of their constituency. The district court opinion is reported at 659 F.Supp. 183 (E.D.La 1987), and printed in the Appendix. App. 28, *infra.*

The respondents appealed to the United States Court of Appeals for the Fifth Circuit, where the judgment of the district court was reversed and the case was remanded because the court concluded that section 2 does apply to the election of state court judges. *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir. 1988). App. 4, *infra.*

A timely filed application for rehearing was denied on May 27, 1988. App. 27, *infra.*

REASONS FOR GRANTING THE WRIT

I

The United States Court of Appeals for the Fifth Circuit Has Decided An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court

This case is one of national importance, as the judiciary selection statutes of forty-two states are affected by the decision below. Of these, thirty-six states employ a direct election process, and six states employ a retention

election process. Only eight states employ either a gubernatorial or legislative selection process. Further, the Attorney General of the United States has certified this to be a case of general public importance.[1]

There are several pending cases concerning which guidance by this Court is needed. Subsumed within the question presented is, if Section 2 of the Voting Rights Act is applicable, must the results test be applied in determining the existence of a violation? Is the results test and corresponding relief compatible with the inappropriateness of applying the one man one vote test to the judiciary? If there is a violation does it permeate the entire judicial system? If a state, such as Louisiana, chooses to change its judicial selection process from an electoral system to one of appointment and/or merit, must it preclear such a change when most of the other forty-two states that elect judges need not preclear a change?

---

[1] On remand the district court granted a preliminary injunction to prevent a scheduled election relating to a Louisiana Supreme Court First District position, the term for which expires on December 31, 1988. In his July 7, 1988 Opinion regarding the preliminary injunction, Judge Schwartz stated, in pertinent part:

> While this Court adheres to its original opinion, the Fifth Circuit has spoken; this Court is bound by the Fifth Circuit's holding, unless and until that holding is either expressly or tacitly overruled judicially by either the Fifth Circuit or the Supreme Court or legislatively by Congress.

Opinion, pages 16-17, July 7, 1988. *Ronald Chisom, et al. v. Edwin Edwards, et al,* Civil Action No. 86-4075, United States District Court for the Eastern District of Louisiana.

Upon the district court's refusal to grant a stay, an expedited appeal was perfected to the court of appeals where a stay of the preliminary injunction was granted to permit qualification to occur. Thereafter, the Fifth Circuit vacated the injunction. After this ruling the Attorney General of the United States moved to intervene in this case, asserting and certifying it to be one of general public importance. The motion was granted. The Fifth Circuit Court of Appeals issued its reasons for vacating the injunction on August 19, 1988. These reasons are reproduced in the appendix at App. 44.

Illustrative as to the need for instructive guidance from this Court are two district court cases within the Fifth Circuit reaching contrary results. In the case of *Martin v. Allain,* 658 F.Supp. 1183 (S.D.Miss. 1987), the district judge has ruled that there need be changes only in those districts where a violation is found, and that the district court will fashion the remedy. In contrast, in the case of *Clark v. Edwards,* Civil Action No. 86-435-(A) (M.D.La.), which affects all of Louisiana's district and intermediate appellate courts, the district judge has enjoined all judicial elections to these courts, even in districts where the plaintiffs presented no evidence whatsoever, and has enjoined the issuance of commissions to those who have been elected without opposition.[2] This district judge has asserted that he will turn the matter over first to the Legislature to fashion a remedy, and if it does not do so, he will fashion the remedy. This same judge has decided that a violation as proved in any judicial district will require that the entire judicial system be changed, despite the absence of violations in many other districts.[3] The *Clark* judge's position appears to be

---

[2] According to Louisiana law, an unopposed candidate is automatically elected and is to be granted a commission. The applicable statute states:

> ELECTION OF UNOPPOSED CANDIDATES FOR PUBLIC OFFICE
>
> If, after the close of the qualifying period for candidates in a primary election, the number of candidates for a public office does not exceed the number of persons to be elected to the office, the candidates for that office, or those remaining after the withdrawal of one or more candidates, are declared elected by the people, and their names shall not appear on the ballot in either the primary or the general election.

LA R.S. 18:511B.

[3] Because of my conviction that there are legally significant differences between judicial elections and legislative

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> elections, it is my view that the remedy for Section 2 violations which are produced by the judicial election system, is to change the system, not to create sub-districts within district courts. Consequently, I conceive it to be my duty, having found violations, to enjoin all district, family court and court of appeal elections until the governor of Louisiana and the Louisiana legislature have had an opportunity to make changes in the judicial election system that will avoid such violations. Hence, I decline to follow the lead of Judge Barbour in Martin v. Allain, 658 F.Supp. 1183 (S.D. Miss. 1987) in confining the remedy to those specific districts in which a violation was found.

Unreported Ruling on Motion for Preliminary Injunction, page 5, August 10, 1988. *Clark v. Edwards,* Civil Action No. 86-435(A) (M.D.La.).

The following Order was signed and filed on August 11, 1988:

> IT IS HEREBY ORDERED that the Governor, the Secretary of State, the Attorney General, and all other election officials, in their official capacities, as well as their attorneys, agents and representatives are hereby preliminarily enjoined from conducting any family court, district court, or court of appeal election which was scheduled for the October 1, 1988 (primary) and November 8, 1988 (general) elections, whether specifically enumerated or not and no certification shall issue to any candidate who qualified for any such election without opposition.
>
> Baton Rouge, Louisiana, August 11, 1988.

Unreported Order, August 11, 1988. *Clark v. Edwards,* Civil Action No. 86-435(A) (M.D.La.).

> Even though no specific Section 2 violation may exist in a particular district at this time, the system employed by the state will allow the creation of a violation, given time.
>
> The remedy is to revise the system—to cast about for alternative procedures under which black voters would have a better chance to elect judicial candidates of their choice.
>
> There are many alternatives which may be considered. This court has no preconceived notion as to what changes the Governor and the Legislature ought to make. This court

(Continued on following page)

clearly at odds with this Court's decision in *Thornburg v. Gingles,* 478 U.S. 30 (1986).

> The inquiry into the existence of vote dilution caused by submergence in a multimember district is district-specific. When considering several separate vote dilution claims in a single case, courts must not *rely* on data aggregated from all the challenged districts in concluding that racially polarized voting exists in each district.

Thornburg, 478 U.S. at 59 n. 28.

Other jurisdictions where the question presented here was, or is, at issue include:

OHIO:

> where the United States District Court, S.D.Ohio, W.D., held the Voting Rights Act to be inapplicable to the judiciary. *Mallory v. Eyrich* 666 F.Supp. 1060 (1987). On appeal the Sixth Circuit Court of Appeals reversed and held the Act applicable to the judiciary and remanded the case. *Mallory v. Eyrich,* 839 F.2d 275 (6th Cir. 1987);

ALABAMA:

> where the case of *Southern Christian Leadership Conference of Alabama, et al. v. State of Ala-*

(Continued from previous page)

> is simply convinced that the present system of electing family court, district court, and court of appeal judges in Louisiana has produced violations of Section 2 of the Voting Rights Act and that it will continue to produce violations unless it is changed.
>
> Accordingly, the preliminary injunction previously issued will be made permanent and will be expanded to enjoin all family court, district court, and court of appeal elections until revisions in the electorial[sic] process are made.

Unreported Findings of Fact and Conclusions of Law, pages 41-42, August 15, 1988. *Clark v. Edwards,* Civil Action No. 86-435 (A) (M.D.La.).

bama, et al., Civil Action No. 88D462-N, was filed on May 11, 1988 in the United States District Court for the Middle District of Alabama, Northern Division and is pending;

GEORGIA:

where the case of *Tyrone Brooks, et al. v. Glynn County, Georgia Board of Elections, et al.*, Civil Action No. CV288-146, was filed on July 18, 1988 in the United States District Court for the Southern District of Georgia, Brunswick Division and is pending;

ILLINOIS:

where the case of *Paul L. Williams, et al. v. State Board of Elections, et al.*, Civil Action No. 88C-2377, was filed on March 22, 1988 in the United States District Court for the Northern District of Illinois, Eastern Division and is pending.[4]

TEXAS:

where the case of *Rita Rangel, et al. v. Jim Mattox, et al.*, Civil Action No. B 88-053, was filed on May 24, 1988 in the United States District Court for the Southern District of Texas, Brownsville District, and the case of *League of United Latin American Citizens et al. v. William Clements, et al.*, Civil Action No. MO-88-CA-154, was filed on July 11, 1988 in the United States District Court for the Western District of Texas, Midland-Odessa Division, and are both pending.

Litigation is anticipated in several other jurisdictions, including an additional suit in Louisiana relating to city court judges.

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[4] This case affects the largest court system in the country [and perhaps the world], 201 judges, all of whom were ordered by John F. Grady, Chief Judge, to be joined as parties on August 4, 1988.

The consideration by this Court of the question presented in this petition will be of invaluable assistance to all of the federal district courts, with the exception of the states which have adopted a judiciary selection system embracing solely one of appointment, namely Delaware, Hawaii, Massachusetts, New Hampshire, New Jersey, Rhode Island, Vermont and Virginia. It would also be helpful for all of the circuit courts, with the exception of the District of Columbia Circuit, for there are from one to several states covered within each circuit where there are judicial elections or retention elections selection systems. These states by circuit are:

First Circuit	Maine
Second Circuit	Connecticut New York
Third Circuit	Pennsylvania
Fourth Circuit	Maryland North Carolina South Carolina West Virginia
Fifth Circuit	Louisiana Mississippi Texas
Sixth Circuit	Kentucky Michigan Ohio Tennessee
Seventh Circuit	Illinois Indiana Wisconsin
Eighth Circuit	Arkansas Iowa [Retention election] Minnesota Missouri [Retention election] Nebraska [Retention election] North Dakota South Dakota

Ninth Circuit	Alaska [Retention election]
	Arizona
	California
	Idaho
	Montana
	Nevada
	Oregon
	Washington
Tenth Circuit	Colorado [Retention election]
	Kansas
	New Mexico
	Oklahoma
	Utah [Retention election]
Eleventh Circuit	Alabama
	Florida
	Georgia

State Court Organization 1987—National Center for State Courts, July 1988. Selection process of appellate and trial court judges [tables 7 and 20].

If the Court does not take this case, chaos will ensue. There are already 7 states which are facing litigation that may require the restructuring of their judicial selection election systems, and it is merely a matter of time until the remaining 35 states that elect judges will be faced with similar suits. For this Court to wait until all such litigation wends its way through the lower courts will create havoc in the judicial process. The Fifth Circuit's opinion vacating the injunction in this case, App. 44 *infra,* explains at length some of the complicating factors involved in restructuring a state's judiciary. Finally, when this Court ultimately decides to take a case, it may require those states that have changed their judicial system to endure another upheaval because of this Court's ultimate ruling.

To have judicial elections enjoined throughout the United States and to have judges serving and deciding cases under a cloud of litigation will discredit the judicial process. Further, it will make it impossible for states to

add judges to handle expanded case loads and to replace judges when an existing position becomes vacant by reason of death, retirement or incapacity. It would be far better for this Court to determine now whether Section 2 applies to the judiciary, and, if so, to establish and promulgate the applicable criteria to prove a Section 2 violation involving judicial elections.

The question, though extremely serious, is not complicated. If substantially all of the forty-two states with a judiciary selection process based upon an election or a retention election, must restructure their systems to conform with the Voting Rights Act, then the sooner the legislatures of the various states may be so authoritatively informed by this Court, the better for an ultimate survival of the state court judiciary. Changes do not come about easily.

II

The Term "Representatives" Is Not A Synonym for "Elected Judicial Officials"

The term "representatives" as used in Section 2(b) of the Voting Rights Act should not be equated with "elected judicial officials," language which appears nowhere in the statute.

This Court has laid down definitive guidelines for construing language which appears in Congressional Acts.

In *Consumer Products Safety Comm'n v. GTE Sylvania*, 447 U.S. 102 (1980), the Court stated:

> We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself.

Id. at 108. Four years later, in furtherance of this concept of construction, the Court held:

> Since it should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses, we have often stated that " '[a]bsent a clearly expressed legislative intention

> to the contrary, [statutory] language must ordinarily be regarded as conclusive.' "

Escondido Mut. Water Co. v. La Jolla Indians, 466 U.S. 765, 773 (1984) [Citations omitted].

In *Dickerson v. New Banner Institute, Inc.,* 460 U.S. 103 (1983), the Court said:

> [W]e state once again the obvious when we note that, in determining the scope of a statute, one is to look first at its language. . . . If the language is unambiguous, ordinarily it is to be regarded as conclusive unless there is " 'a clearly expressed legislative intent to the contrary.' "

Id. at 853 [Citations omitted].

The term "representatives" refers to those who serve a specialized constituency and whose role is to represent the needs and interests of that constituency. The term "representatives" has never been commonly accepted as including the judicial branch; indeed, the reverse is true—namely, the judicial branch always has been treated as separate and distinct from the other two representative arms of government.

A representative of a district, be it federal, state, or local, exists to serve and favor his or her constituency, while hopefully also working for the good of the governmental jurisdiction as a whole. United States representatives are expected to help get government contracts for their districts; no one, however, would expect a federal judge to uphold such a contract citing as a reason the need of his area for governmental business. State legislators are expected to seek bridges and roads for their districts; no one, however, would expect a state judge to mandate that such bridges and roads be built because the people want them. City councilmen are expected to promote drainage projects for their council districts; no one, how-

ever, would expect a city judge to require them to keep his voters happy.

Judges thus are not representatives; further, they should not be representatives. The larger the constituency, the less parochial pressures can be brought to bear. An advantage to at-large elections for judges is that judges can make the difficult decisions without undue fear of dissatisfaction in the electorate. A judge would be much less likely to vote against the residents of a neighborhood on a zoning issue if that judge was elected solely by that neighborhood. Justice ought to be identical throughout a judicial system; electing judges from neighborhoods, however, might make for a system of individualized justice currently foreign to the United States. Admittedly, many problems could be cured on appeal; however, it can be extremely difficult to reverse a detailed record of fact-finding even when the facts have been slanted. Further, the respondents here seek to make appellate districts smaller also, again lessening the number and mix of a judge's constituency.

An independent judiciary is crucial to the proper functioning of a constitutional form of government. The framers of our Constitution insulated the federal judiciary from the day-to-day whims, pressures, and reactions of other branches of government. The framers' mechanism to achieve an independent judiciary was appointment for life with the advice and consent of the Senate for Article III judges; however, constitutional jurisprudence has not suggested that elected state judges should be any less independent. Indeed, numerous constitutional rights are protected only through the existence of an independent judiciary.

The Court has long recognized that the unique position of a state judiciary (as opposed to other state officers, officials, and elected representatives) affords constitutional protections to all. For example:

1. It is the existence of an independent judicial officer (whether elected or appointed) examining requests for search warrants that protects the rights against unlawful searches and seizures. *Katz v. United States,* 389 U.S. 347 (1967); *California v. Carney,* 471 U.S. 386 (1985) (dicta).

2. It is the existence of an independent judicial officer, and that judge's review and evaluation of documents, that makes a prejudgment seizure lawful and not violative of due process rights in civil actions. *Mitchell v. W. T. Grant,* 416 U.S. 600 (1974). In *Mitchell,* the Supreme Court specifically held Louisiana's prejudgment seizure statutes constitutional because of the scrutiny of Louisiana District Court Judges.

3. The Supreme Court, in discussing Article III, Section 1's guarantee of an independent and impartial adjudication by a federal judiciary, has read prior cases as indicating that the existence of an independent judiciary "serves to protect primarily personal, rather than structural, interests." *Commodity Futures Trading Commission v. Schor,* — U.S. —, at —, 106 S.Ct. 3245, at 3256, 92 L.Ed.2d 675 at 691 (1986). Likewise, state judges protect the personal interest of the litigants, not structural interests of the State or of the electorate.

4. In paternity proceedings, the State as an entity may have one set of interests, but it is the existence of an independent judiciary that protects the rights of litigants, not any state interest perceived by members of the legislative or executive branch. *See Rivera v. Minnich,* — U.S. —, 107 S.Ct. 3001, 97 L.Ed.2d 473, 481 n. 8 (1987).

5. Local legislative and executive officials may seek to pass and enforce ordinances prohibiting the posting of signs on public property. While purely aesthetic objectives may be considered and en-

> acted by local elected officials, the enforceability and constitutionality of those laws must be ascertained by an independent judicial assessment of the substantiality of the government's interest and by a court's scrutiny of aesthetics-based restrictions on speech. *See, e.g., Members of the City Council of the City of Los Angeles v. Taxpayers' for Vincent*, 466 U.S. 789 (1984).

These are but a few examples of the importance of an independent judiciary in the range of constitutional issues that affect the life of every citizen of this country.

Congress, had it wanted specifically to include judges under Section 2(b) of the Voting Rights Act, could have done so by substituting the term "elected officials" for the term "representative"; it did not do so. In a representative form of government, such as ours, it is always true that a "representative" is an "elected official"; however, the converse is *not* always true.

The 1982 Amendment to the Voting Rights Act of 1965 added language describing those circumstances that would constitute a violation of Section 2. Section 2(b) expressly states that a violation exists when "[members of a protected class] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."

Representatives have a constituency which numbers in the hundreds to hundreds of thousands, to each of whom they owe fidelity and from each of whom they are likely, sooner or later, to receive correspondence or a telephone call or even perhaps a personal visit.

Judges have but one constitutency, the blindfolded lady with scales, sword and shield.

III

Louisiana's Time Honored Tradition Of Electing Its Judiciary Has Passed Justice Department Scrutiny

The statutes and laws concerning the Louisiana judicial electoral system are not, in whole or part, products of racial discrimination. Louisiana first introduced its judicial selection system 136 years ago in its 1852 Constitution, Article 64. The parishes of Orleans, St. Bernard, Plaquemines, and Jefferson have had two justices on the Louisiana Supreme Court since Louisiana's 1879 Constitution Article 82, adopted 109 years ago. *See* 1898 Constitution Article 87; 1913 Constitution Article 87; 1921 Constitution Article 7 § 9; 1974 Constitution Article 5, § 4.

The 1974 Constitution, Article 14, § 16, relegated the listing of districts formerly in Article 7, § 9 of the 1921 Constitution to the statutes. This statute is LA. R.S. 13:101.

The 1974 Constitution was precleared by the Justice Department of the United States of America on November 26, 1974 [thus after the adoption of the Voting Rights Act] except for Article 8 § 10B, which was subsequently precleared on June 6, 1983 [thus after the 1982 amendment to the Voting Rights Act].

In Orleans Parish blacks have always had the opportunity of voting for the candidates of their choice. In 1972 both positions on the Louisiana Supreme Court for the First Supreme Court District were vacant. Two blacks, Judge Ortique and a Mr. Amadee, ran for election, one for each of the seats, with the following results:

	Total	*Orleans*
Ortique	27,326	21,224
Calogero	66,411	33,700
Redmann	21,865	10,240
Sarpy	74,320	34,011

	Total	*Orleans*
Amedee	11,722	8,847
Marcus	78,520	47,725
Bossetta	35,267	19,115
Garrison	51,286	25,437
Samuel	25,659	6,042

New Orleans Times-Picayune, August 21, 1972 (on file in the Louisiana Supreme Court Judicial Administrator's office).

Judge Ortique thus received in Orleans Parish 21.4% of the vote, and Mr. Amadee received 8.26% of the votes in Orleans Parish. In 1972 blacks represented 33.35% of the registered voters in Orleans Parish; therefore, the majority of the blacks voted for the white candidate in one race, and a substantial percentage in the other.

IV

This Court's Decisions Make Clear That Judges Are Not, And Should Not Be, Representatives

The Supreme Court's use of the word "representatives" over the years shows that the Court considers the term to refer to legislators or administrators as opposed to judges. For example, in *Davis v. Bandemer,* 478 U.S. 109 (1986), the Court used the terms "representative" and "legislator" interchangeably:

> Rather, it is that one electoral district elects a single *representative* and another district of the same size elects two or more—the elector's vote in the former district having less weight in the sense that he may vote for and his district be represented by only one *legislator,* while his neighbor in the adjoining district votes for and is represented by two or more.

Id. at 123.

Connor v. Finch, 431 U.S. 407 (1977), a voting rights case, also uses the terms interchangeably:

> The Equal Protection Clause requires that *legislative* districts be of nearly equal population, so that each person's vote may be given equal weight in the election of *representatives.*

Id. at 416; *accord, White v. Regester,* 412 U.S. 755, 764, 779 (1973).

In *Reynolds v. Sims,* 377 U.S. 533 (1964), the Court, while speaking of state legislatures, stated that those individuals elected to the legislative branch were the people's representatives:

> As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system. . . . But representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies.

Id. at 562, 565. The Court went on to call the state legislature "the only instrument of state government directly representative of the people." *Id.* at 576; *accord, Whitcomb v. Chavis,* 403 U.S. 124, 141 (1971).

In his concurring opinion in *Dennis v. United States,* 341 U.S. 494 (1951), Justice Frankfurter flatly stated: "Courts are not representative bodies. They are not designed to be a good reflex of a democratic society." *Id.* at 517, 525 (Frankfurter, J., concurring in the judgment).

In *Avery v. Midland County,* 390 U.S. 474 (1968), another voting rights case, the Court made clear the applicability of the Equal Protection clause of the Fourteenth Amendment to local subdivisions, again using the term "representative." The Court noted that state legislators

enact many laws but do not govern countless matters of local concern, which are left to the local level to decide:

> What is more, in providing for the governments of their cities, counties, towns, and districts, the States characteristically provide for representative government—for decisionmaking at the local level by representatives elected by the people.

Id. at 481. The defendants had argued that the County Commissioners Court was not sufficiently legislative and that therefore unequal districts were permissible. The Court, however, noted that many of its functions were legislative and that the County Commissioners Court was a general governing body:

> [T]he court does have power to make a large number of decisions having a broad range of impacts on all the citizens of the county. It sets a tax rate, equalizes assessments, and issues bonds. It then prepares and adopts a budget for allocating the county's funds, and is given by statute a wide range of discretion in choosing the subjects on which to spend.

Id. at 483. Because of these general powers, the County Commissioners Court could not have unequal districts. Never is there any intimation in the opinion that a purely judicial body would be judged the same way by the Court.

In *Milwaukee v. Illinois,* 451 U.S. 304 (1981), the Court contrasted the role of the courts with that of Congress, a representative body:

> The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from electoral pressures, but by the people through their elected representatives in Congress.

Id. at 312-13; *accord, Schweiker v. Wilson,* 450 U.S. 221, 230 (1981); *Cannon v. University of Chicago,* 441 U.S.

677, 696-97 (1979) ("it is always appropriate to assume that our elected representatives . . . know the law.").

In arguing that the Supreme Court should not invalidate a Connecticut birth control statute, Justice Stewart stated:

> It is the essence of judicial duty to subordinate our own personal views, our own ideas of what legislation is wise and what is not. If, as I should surely hope, the law before us does not reflect the standards of the people of Connecticut, the people of Connecticut can freely exercise their true Ninth and Tenth Amendment rights to persuade their elected *representatives* to repeal it.

Griswold v. Connecticut, 381 U.S. 479, 530-31 (1965) (Stewart, J., dissenting) (emphasis esupplied).

V

The Fundamental Difference Between Representatives And Members Of The Judiciary Is Deeply Rooted In This Country's History

The legal history of this nation demonstrates a clear and concise distinction as between one who is a representative of the people and one who dedicates his life to a different calling, that of the judiciary.

The idea that judges are to be "representatives" is totally foreign to American legal history. Instead, this country was founded, and has endured, on the principle of an *independent* judiciary free of the sort of constituent pressures on, and parochial viewpoints required of, legislators.

The history of the American judiciary was traced by Professor G. Edward White in *The American Judicial*

Tradition.[5] Professor White began by stating that during colonial times judges "were agents of the provincial government" with "a wide range of petty powers but of little independence." *Judicial Tradition* 7.

Beginning with Chief Justice John Marshall, the American judicial tradition emerged. A core element of that tradition has always included "a measure of true independence and autonomy for the appellate judiciary from the other two branches of government." *Judicial Tradition* 9. Professor White summarized Chief Justice Marshall's views concerning the judiciary as follows:

> An independent judiciary was logically the ultimate necessity in Marshall's jurisprudence, the culmination of his beliefs about law and government. He sought to show that judicial independence as not merely a side effect of federalism but a first principle of American civilization. . . . Against the potential chaos attendant on mass participatory democracy, republicans erected the institutional buffers of legislative representatives and an independent judiciary. The excesses of the people were moderated by representation, a process by which their passionate demands were reformulated by an enlightened and reasonable class of public servants. The need of the populace for an articulation of their individual rights under law was met by the presence of a body of judges not beholden to the masses in any immediate, partisan sense.

Judicial Tradition 18, 20.

Chief Justice Marshall's vision of the American judicial tradition was not unique. Alexander Hamilton "envisaged judicial review as an exercise in politics through which an independent judicial elite could temper the dem-

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[5] Citations are hereinafter abbreviated as *Judicial Tradition*. Page references refer to the 1978 Oxford University Press paperback edition.

ocratic excesses of legislatures by affirming the republican political balances inherent in the Constitution." *Judicial Tradition* 24. Some among the Founding Fathers thought an independent judiciary necessary because "even a government made up of the people's representatives was not a sufficient buffer against the excesses of the mob." *Judicial Tradition* 320.

This American judicial tradition has not been applicable only to the federal judiciary. Professor White commented that the state constitutions "were patterned on the federal Constitution, with its tripartite division of powers." *Judicial Tradition* 109. James Kent, Chief Judge of the New York Supreme Court and later Chancellor of New York, "viewed the judiciary as a buffer between established wealth and the excessively democratic legislature." *Judicial Tradition* 112. Much more recently, Roger Traynor, Chief Justice of the California Supreme Court, wrote that judges "enjoyed a 'freedom from political and personal pressures and from adversary bias' [and that] [t]heir 'environment for work' was 'independent and analytically objective.' " *Judicial Tradition* 296, quoting Traynor, "Badlands in an Appellate Judge's Realm of Reasons," 7 Utah L. Rev. 157, 167, 168 (1960).

Professor White traced "modern liberalism" trends throughout the Twentieth Century. According to this political theory, judges "were not, by and large, representatives of the people, and their nonpartisan status insulated them from the waves of current opinion." *Judicial Tradition* 320. Legislatures on the other hand "were 'representative of popular opinion' and could 'canvass a wide spectrum of views.' " *Judicial Tradition* 322. One

Twentieth Century Justice, Felix Frankfurter, has called the judiciary the "antidemocratic, unrepresentative" branch of government." *Judicial Tradition* 367.[6]

Legal theorists have also stated that judges are not "representatives." Perhaps the most provocative book to appear on judicial review during the last few years is *Democracy and Distrust* by Professor John Hart Ely.[7] Professor Ely contrasts the role of the courts with the role of the *representative* branch of government, the legislative branch. He sought an approach to judicial review "not hopelessly inconsistent with our nation's commitment to representative democracy." *Democracy and Distrust* 41. In his book, Professor Ely developed a representation-reinforcing theory of judicial review in which the non-representative branch, the judiciary, would review legislation to review the motivation of the representative branch, the legislature, to make sure that the views of all groups were represented in lawmaking. He concluded by stating that "constitutional law appropriately exists for those situations where representative government cannot be trusted." *Democracy and Distrust* 183.

Professor Alexander Bickel spoke of the importance of judicial independence in *The Supreme Court and the Idea of Progress*:[8]

> The restraints of reason tend to ensure also the independence of the judge, to liberate him from the de-

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[6] Professor Lawrence Friedman also has written about the history of a strong, independent judiciary in the federal system and in state systems. L. Friedman, *A History of American Law* 116, 118 (Simon & Schuster 1973 paperback edition).

[7] Page references are to the 1980 Harvard University Press hardbound edition.

[8] Citations are hereinafter abbreviated as *Supreme Court and Progress*. Page references refer to the 1978 Yale University Press paperback edition.

> mands and fears—dogmatic, arbitrary, irrational, self- or group-centered—that so often enchain other public officials. They make it possible for the judge, on some occasions, at any rate, to oppose against the will and faith of others, not merely his own will or deeply-felt faith, but a method of reaching judgments that may command the allegiance, on a second thought even of those who find a result disagreeable. The judge is thus buttressed against the world, but what is perhaps more significant and certain, against himself, against his own uatural tendency to give way before waves of feeling and opinion that may be as momentary as they are momentarily overwhelming. . . .
>
> The independence of the judges is an absolute requirement if individual justice is to be done, if a society is to ensure that individuals will be dealt with in accordance with duly enacted policies of the society, not by the whim of officials or of mobs, and dealt with evenhandedly, under rules that would apply also to others similarly situated, no matter who they might be.

Supreme Court and Progress 82, 84.

Professor Bickel contrasted the Court on the one hand with the people and its representatives on the other, stating, "Virtually all important decisions of the Supreme Court are the beginnings of conversations between the Court and the people and their representatives." *Supreme Court and Progress* 91.

Supreme Court and Progress also contains much material on reapportionment. *Supreme Court and Progress* 35, 158-59, 168-73. Never in that discussion is there any intimation that redistricting of the courts ought to be considered. That notion would run counter to his strong argument for judicial independence.

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CONCLUSION

This Court has always recognized the importance of an independent judiciary. This Court has held that, "There can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function." *Chandler v. Judicial Council,* 398 U.S. 74, 84 (1970). In a dissent in the same case, Justice Douglas stated, "An independent judiciary is one of this Nation's outstanding characteristics." *Id.* at 136 (Douglas, J., dissenting).

A quarter of a century ago this Court declared, "Legislators represent people, not trees or acres." *Reynolds v. Sims,* 377 U.S. 533, 562 (1964). Judges, on the other hand, must consider the interests of people and of trees (as well as snail darters, *see Tennessee Valley Authority v. Hill,* 437 U.S. 153 (1978)). Unlike legislators, judges are not "instruments of government elected directly by and directly representative of the people." 377 U.S. at 562. Making judges representatives would do violence to (and perhaps destroy) the American concept of an independent judiciary.

For the foregoing reasons, a writ of certiorari should, therefore, be granted to review and ultimately reverse the decision below.

All of the above and foregoing is thus respectfully submitted.

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42 § 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Louisiana Constitution

Article 5. Judicial Branch

Section 3. Supreme Court; Composition; Judgments; Terms

Section 3. The supreme court shall be composed of a chief justice and six associate justices, four of whom must concur to render judgment. The term of a supreme court judge shall be ten years.

Section 4. Supreme Court; Districts

Section 4. The state shall be divided into at least six supreme court districts, and at least one judge shall be elected from each. The districts and the number of judges assigned to each on the effective date of this constitution are retained, subject to change by law enacted by two-thirds of the elected members of each house of the legislature.

Louisiana Revised Statutes

R.S. 13:101 Supreme court district; justices

The state shall be divided into six supreme court districts and the supreme court shall be composed of justices from the said districts as set forth below:

(1) First district. The parishes of Orleans, St. Bernard, Plaquemines, and Jefferson shall compose the first district, from which two justices shall be elected.

(2) Second district. The parishes of Caddo, Bossier, Webster, Claiborne, Bienville, Natchitoches, Red River, DeSoto, Winn, Vernon, and Sabine shall compose the second district, from which one justice shall be elected.

(3) Third district. The parishes of Rapides, Grant, Avoyelles, Lafayette, Evangeline, Allen, Beauregard, Jefferson Davis, Calcasieu, Cameron, and Acadia shall compose the third district from which one justice shall be elected.

(4) Fourth district. The parishes of Union, Lincoln, Jackson, Caldwell, Ouachita, Morehouse, Richland, Franklin, West, Carroll, East Carroll, Madison, Tensas, Concordia, LaSalle, and Catahoula shall compose the fourth district, from which one justice shall be elected.

(5) Fifth district. The parishes of East Baton Rouge, West Baton Rouge, West Feliciana, East Feliciana, St. Helena, Livingston, Tangipahoa, St. Tammany, Washington, Iberville, Pointe Coupee, and St. Landry shall compose the fifth district, from which one justice shall be elected.

(6) Sixth district. The parishes of St. Martin, St. Mary, Iberia, Terrebonne, Lafourche, Assumption, Ascension, St. John the Baptist, St. James, St. Charles, and Vermilion shall compose the sixth district from which one justice shall be elected.

App. 4

Ronald CHISOM, et al.,
Plaintiffs-Appellants,

v.

Edwin EDWARDS, in his capacity as
Governor of the State of Louisiana,
et al., Defendants-Appellees.

No. 87-3463.

United States Court of Appeals,
Fifth Circuit.

Feb. 29, 1988.

Black registered voters in Orleans Parish of Louisiana brought suit challenging constitutionality of present system of electing Louisiana Supreme Court Justices from First Supreme Court District. The United States District Court for the Eastern District of Louisiana, Charles Schwartz, Jr., J., 659 F.Supp. 183, dismissed, and voters appealed. The Court of Appeals, Johnson, Circuit Judge, held that: (1) judicial elections are covered by Voting Rights Act section which prohibits any law or procedure which has effect of denying or abridging right to vote on basis of race, and (2) complaint by black registered voters challenging current at-large system of electing state Supreme Court Justices from their district established theory of discriminatory intent and stated claim of racial discrimination under Fourteenth and Fifteenth Amendments.

Reversed and remanded.

1. Elections 12(1)

Judicial elections are covered by Voting Rights Act section which prohibits any law or procedure which has effect of denying or abridging right to vote on basis of

race. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

2. Civil Rights 13.4(6)

Elections 7

Discriminatory purpose is prerequisite to recovery under Fourteenth and Fifteenth Amendments. U.S.C.A. Const. Amends. 14, 15.

3. Civil Rights 13.12(3)

Elections 7

Complaint by black registered voters challenging current at-large system of electing state Supreme Court Justices from their district established theory of discriminatory intent and stated claim of racial discrimination under Fourteenth and Fifteenth Amendments; voters cited history of purposeful official discrimination on basis of race in state and existence of wide-spread racially polarized voting in elections involving black and white candidates, concluding that current election procedures for selecting Supreme Court Justices from their area diluted minority voting strength. U.S.C.A. Const.Amends. 14, 15.

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Appeal from the United States District Court for the Eastern District of Louisiana.

Before BROWN, JOHNSON, and HIGGINBOTHAM, Circuit Judges.

JOHNSON, Circuit Judge:

Plaintiffs, black registered voters in Orleans Parish, Louisiana, raise constitutional challenges to the present system of electing Louisiana Supreme Court Justices from the First Supreme Court District. Plaintiffs allege that the current at-large system of electing Justices from the First District impermissibly dilutes the voting strength of black voters in Orleans Parish in violation of Section 2 of the Voting Rights Act of 1965, as amended in 1982 and the fourteenth and fifteenth amendments. The district court dismissed the section 2 claim pursuant to Fed. R.Civ.P. 12(b)(6) for failure to state a claim, finding that section 2 does not apply to the election of state judges. Concluding that section 2 does so apply, we reverse.

The primary issue before this Court is whether section 2 of the Voting Rights Act applies to state judicial elections.

I. FACTS AND PROCEDURAL HISTORY

The facts are undisputed. Currently, the seven Justices on the Supreme Court of Louisiana are elected from six geographical judicial districts. Five of the six districts elect one Justice each. However, the First District, comprised of four parishes (Orleans, St. Bernard, Plaquemines, and Jefferson Parishes), elects two Justices at-large.

The population of the four parish First Supreme Court District is approximately thirty-four percent black and sixty-three percent white. The registered voter population reveals a somewhat similar percentage breakdown, with approximately thirty-two percent black and sixty-eight percent white. Over half of the four parish First Supreme Court District's population and over half of the district's registered voters live in Orleans Parish. Importantly, Orleans Parish has a fifty-five percent black population and a fifty-two percent black registered voter population. Plaintiffs seek a division of the First District into two single-member districts, each to elect one Justice. Under the plaintiffs' plan of division, one proposed district would be composed of Orleans Parish with a greater black population and black registered voter population than white. The other proposed district would be composed of Jefferson, Plaquemines, and St. Bernard Parishes; this district would have a substantially greater white population and white registered voter population than black. It is particularly significant that no black person

has ever been elected to the Louisiana Supreme Court, either from the First Supreme Court District or from any one of the other five judicial districts.

To support their voter dilution claim, plaintiffs cite, among other factors, a history of purposeful official discrimination on the basis of race in Louisiana and the existence of widespread racially polarized voting in elections involving black and white candidates. Specifically, plaintiffs allege in their complaint:

> Because of the official history of racial discrimination in Louisiana's First Supreme Court District, the wide spread prevalence of racially polarized voting in the district, the continuing effects of past discrimination on the plaintiffs, the small percentage of minorities elected to public office in the area, the absence of any blacks elected to the Louisiana Supreme Court from the First District, and the lack of any justifiable reason to continue the practice of electing two Justices at-large from the New Orleans area only, plaintiffs contend that the current election procedures for selecting Supreme Court Justices from the New Orleans area dilutes minority voting strength and therefore violates the 1965 Voting Rights Act, as amended.

On May 1, 1987, the district court, 659 F.Supp. 183, dismissed plaintiffs' complaint for failure to state a claim upon which relief may be granted. In its opinion accompanying the dismissal order, the district court concluded that section 2 of the Voting Rights Act does not apply to the election of state judges. To support this conclusion, the district court relied primarily on the amended language in section 2 which states "to elect representatives of their choice." The district court reasoned that since judges are not "representatives," judicial elections are therefore

not within the protective ambit of section 2. Focusing on a perceived inherent difference between representatives and judges, the district court stated, "[j]udges, by their very definition, do not represent voters but are 'appointed [or elected] to preside and administer the law.'" (citation omitted). The district court further relied on what was understood to be a lack of any reference to judicial elections in the legislative history of section 2, and on previous court decisions establishing that the "one person, one vote" principle does not apply to judicial elections. As to plaintiffs' fourteenth and fifteenth amendment challenges, the district court determined that plaintiffs had failed to plead an intent to discriminate with sufficient specificity to support their constitutional claims. Plaintiffs appeal the district court's dismissal of both their statutory and constitutional claims.

[1] In an opinion just released, the Sixth Circuit, addressing a complaint that the present system of electing municipal judges to the Hamilton County Municipal Court in Ohio violates section 2, concluded that section 2 does indeed apply to the judiciary. *Mallory v. Eyrich,* 839 F.2d 275 (6th Cir.1988). Other than our district court, only two district courts have ruled on the coverage of section 2 in this context. The *Mallory* district court, subsequently reversed, concluded that section 2 does not extend to the judiciary. *Mallory v. Eyrich,* 666 F.Supp. 1060 (S.D. Ohio 1987). The other district court, *Martin v. Allain,* 658 F. Supp. 1183 (S.D.Miss. 1987), determined that section 2 does apply to the judicial branch. After consideration of the language of the Act itself; the policies behind the enactment of section 2; pertinent legislative history; previous judicial interpretations of section 5, a companion sec-

tion to section 2 in the Act; and the position of the United States Attorney General on this issue; we conclude that section 2 does apply to the election of state court judges. We therefore reverse the judgment of the district court.

A. *The Plain Language of the Act*

The Voting Rights Act was enacted by Congress in 1965 for a broad remedial purpose—"to rid the country of racial discrimination in voting." *South Carolina v. Katzenbach,* 383 U.S. 301, 315, 86 S.Ct. 803, 812, 15 L.Ed.2d 769 (1966). Since the inception of the Act, the Supreme Court has consistently interpreted the Act in a manner which affords it "the broadest possible scope" in combatting racial discrimination. *Allen v. State Board of Elections,* 393 U.S. 544, 565, 89 S.Ct. 817, 831, 22 L.Ed.2d 1 (1969). As a result ,the Act effectively regulates a wide range of voting practices and procedures. *See United States v. Sheffield Board of Commissioners,* 435 U.S. 110, 122-23, 98 S.Ct. 965, 974-75, 55 L.Ed.2d 148 (1978). Referred to by the Supreme Court as a provision which "broadly prohibits the use of voting rules to abridge exercise of the franchise on racial grounds," *Katzenbach,* 383 U.S. at 316, 86 S.Ct. at 812, section 2 of the Voting Rights Act of 1965, prior to its amendment in 1982, provided as follows:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title.

Congress amended section 2 in 1982 in response to the Supreme Court's decision in *Mobile v. Bolden,* 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), wherein the Court concluded that section 2 operated to prohibit only intentional acts of discrimination by state officials. In disagreement with the high court's pronouncement, Congress amended section 2 with language providing that proof of intent is not required to successfully prove a section 2 violation. Instead, Congress adopted the "results" test, whereby plaintiffs may prevail under section 2 by demonstrating that, under the totality of the circumstances, a challenged election law or procedure has the effect of denying or abridging the right to vote on the basis of race. However, while effecting significant change through the 1982 amendments, Congress specifically retained the operative language of original section 2 defining the section's coverage—"[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed. . . ." Section 2, as amended in 1982, now provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class

> of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Section 14(c)(1), which defines "voting" and "vote" for purposes of the Act, sets forth the types of election practices and elections which are encompassed within the regulatory sphere of the Act. Section 14(c)(1) states,

> The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special or general election, including, but not limited to, registration, listing pursuant to this subchapter or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

Clearly, judges are "candidates for public or party office" elected in a primary, special, or general election; therefore, section 2, by its express terms, extends to state judicial elections. This truly is the only construction consistent with the plain language of the Act.[1]

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1. Evidence of congressional intent to reach all types of elections, regardless of who or what is the object of the vote, is the fact that votes on *propositions* are within the purview of the Act. Section 14(c)(1).

In *Dillard v. Crenshaw County*, 831 F.2d 246 (11th Cir.1987), the Eleventh Circuit addressed the issue of the coverage of section 2. In *Dillard*, the court rejected the defendant county's implicit argument that the election of an at-large chairperson of a county commission was not covered by section 2 due to that position's administrative, as opposed to legislative, character. The *Dillard* court stated,

> Nowhere in the language of Section 2 nor in the legislative history does Congress condition the applicability of Section 2 on the function performed by an elected official. The language is only and uncompromisingly premised on the fact of nomination or election. Thus, on the face of Section 2 it is irrelevant that the chairperson performs only administrative and executive duties. It is only relevant that Calhoun County has expressed an interest in retaining the post as an electoral position. Once a post is open to the electorate, and if it is shown that the context of that election creates a discriminatory but corrigible election practice, it must be open in a way that allows racial groups to participate equally.

Id. at 250.

The State asserts that by amending section 2 in 1982, Congress intentionally grafted a limitation on section 14(c)(1) that "candidates for public or party office" only include "representatives"; since judges are not "representatives," state judicial elections are exempt from the protective measures of the Act. In making this contention, the State, as well as the district court, points to the distinctive functions of judges as opposed to other elected officials. Specifically, the district court, citing *Wells v. Edwards*, 347 F.Supp. 453 (M.D.La. 1972), *aff'd*, 409 U.S.

1095, 93 S.Ct. 904, 34 L.Ed.2d 679 (1973), notes that the "one person, one vote" principle of apportionment has been held not to apply to the judicial branch of government on the basis of this distinction. *See also Voter Information Project v. City of Baton Rouge,* 612 F.2d 208 (5th Cir.1980). In *Wells,* the plaintiff sought reapportionment of the Louisiana Supreme Court Judicial Districts in accordance with one person, one vote principles. The *Wells* court rejected the plaintiff's claim, reasoning that the "primary purpose of one-man, one-vote apportionment is to make sure that each official member of an elected body speaks for approximately the same number of constituents." *Wells,* 347 F.Supp. at 455. The district court then concluded that since judges do not represent, but instead serve people, the rationale behind one person, one vote apportionment of preserving a representative form of government is not relevant to the judiciary. *Id.*

In *Voter Information,* this Court, bound by the holding in *Wells* due to the Supreme Court's summary affirmance of that decision, rejected the plaintiff's claim for reapportionment of judicial districts on the one person, one vote theory. *Voter Information,* 612 F.2d at 211. However, the *Voter Information* Court then emphasized that the plaintiffs further asserted claims of racial discrimination under the fifteenth amendment which resulted in the dilution of black voting strength. Recognizing the difference between the two types of claims, the Court expressly rejected the applicability of the *Wells* decision to claims of racial discrimination, stating,

> [T]he various 'one man one vote' cases involving Judges make clear that they do *not* involve claims of race discrimination as such.

> To hold that a system designed to dilute the voting strength of black citizens and prevent the election of blacks as Judges is immune from attack would be to ignore both the language and purpose of the Fourteenth and Fifteenth Amendments. The Supreme Court has frequently recognized that election schemes not otherwise subject to attack may be unconstitutional when designed and operated to discriminate against racial minorities.

Id. (footnote omitted).

We, like the *Voter Information* Court, are bound by the Supreme Court's affirmance of *Wells* and its holding that the one person, one vote principle does not extend to the judicial branch of government. However, the district court's reliance on *Wells* in the instant case is misplaced as we are not concerned with a complaint seeking reapportionment of judicial districts on the basis of population deviations between districts. Rather, the complaint in the instant case involves claims of racial discrimination resulting in vote dilution under section 2 of the Voting Rights Act and the fourteenth and fifteenth amendments. Therefore, the district court erred to the extent it relied on *Wells* in support of its conclusion that section 2 does not apply to the judiciary.[2]

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2. The distinction between equal protection principles applicable to claims based on one person, one vote principles of apportionment and those based on racial discrimination is not without prior Supreme Court precedent. *See White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973) (Court reversed decision of district court that reapportionment plan for Texas House of Representatives violated one person, one vote principles, but affirmed the district court's conclusion that a particular portion of the plan unlawfully

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The Voting Rights Act was enacted, in part, to facilitate the enforcement of the guarantees afforded by the Constitution. Indeed, section 2, as originally written, no more than elaborated on the fifteenth amendment, providing statutory protection consonant with that of the constitutional guarantee. *Mobile,* 446 U.S. at 60, 100 S.Ct. at 1496. Therefore, the reasoning utilized by the Court in *Voter Information* to extend the protection from racial discrimination provided by the fourteenth and fifteenth amendments to the judiciary compels a conclusion by this Court that the protection from racial discrimination provided by section 2 likewise extends to state judicial elections.

It is difficult, if not impossible, for this Court to conceive of Congress, in an express attempt to expand the coverage of the Voting Rights Act, to have in fact amended the Act in a manner affording minorities less protection from racial discrimination than that provided by the Constitution. We conclude today that section 2, as amended in 1982, provides protection commensurate with the fourteenth and fifteenth amendments; therefore, in accordance with this Court's decision in *Voter Information,* section 2 necessarily embraces judicial elections within its scope. Any other construction of section 2 would be whol-

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diluted minority voting strength.). *See also Gaffney v. Cummings,* 412 U.S. 735, 751, 93 S.Ct. 2321, 2330, 37 L.Ed.2d 298 (1973) ("A districting plan may create multi-member districts perfectly acceptable under equal population standards, but invidiously discriminatory because they are employed 'to minimize or cancel out the voting strength of racial or political elements of the voting population.' ") (citations omitted).

ly inconsistent with the plain language of the Act and the express purpose which Congress sought to attain in amending section 2; that is, to expand the protection of the Act.

B. *The Legislative History of Section 2*

Our conclusion today finds further support in the legislative history of the 1982 amendments to section 2. An overriding principle which guides any analysis of the legislative history behind the Voting Rights Act is that the Act must be interpreted in a broad and comprehensive manner in accordance with congressional intent to combat racial discrimination of any kind in all voting practices and procedures. Thus, in the absence of *any* legislative history warranting a conclusion that section 2 does not apply to state judicial elections, the only acceptable interpretation of the Act is that such elections are so covered. *See Sheffield*, 435 U.S. 110, 98 S.Ct. 965.[3]

As previously noted, Congress amended section 2 in direct response to the Supreme Court's decision in *Mobile v. Bolden*,

> The Senate Report states that amended [section] 2 was designed to restore the "results test"—the legal

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3. In *Sheffield*, the Supreme Court declined to adopt a narrowing construction of § 5 and the preclearance requirements of the Act whereby § 5 would cover only counties and political units that conduct voter registration. "[I]n view of the structure of the Act, it would be unthinkable to adopt the District Court's construction unless there were persuasive evidence either that § 5 was intended to apply only to changes affecting the registration process or that Congress clearly manifested an intention to restrict § 5 coverage. . . ." 435 U.S. at 122, 98 S.Ct. at 974.

> standard that governed voting discrimination cases prior to our decision in *Mobile v. Bolden*. . . . Under the "results test," plaintiffs are not required to demonstrate that the challenged electoral law or structure was designed or maintained for a discriminatory purpose.

Thornburg v. Gingles, 478 U.S. 30, 106 S.Ct. 2752, 2763 n. 8, 92 L.Ed.2d 25 (1986) (citations omitted). In amending section 2, Congress preserved the operative language of subsection (a) defining the coverage of the Act and merely added subsection (b) to adopt the "results test" for proving a violation of section 2. In fact, the language added by Congress in subsection (b)—"to participate in the political process and to elect representatives of their choice"—is derived almost verbatim from the Supreme Court's standard governing claims of vote dilution on the basis of race set forth in *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), prior to *Mobile v. Bolden*. *See* S.Rep.No. 417, 97th Cong., 2d Sess. 27, *reprinted in* 1982 U.S. Code Cong. & Admin. News 177, 205 (Congress' stated purpose in adding subsection (b) was to "embod[y] the test laid down by the Supreme Court in *White*."). In *White*, the Court stated "[t]he plaintiffs' burden is to produce evidence . . . that [the minority groups'] members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *Id.* at 766, 93 S.Ct. at 2339.[4]

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4. It might be argued that since the Supreme Court used the term "legislators" and Congress chose "representatives," Congress thereby rejected language limiting the coverage of § 2

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Further, contrary to the statement in the district court's opinion that the legislative history of the 1982 amendments does not address the issue of section 2 applying to the judiciary, Senator Orrin Hatch, in comments contained in the Senate Report, stated that the term " 'political subdivision' encompasses *all* governmental units, including city and county councils, school boards, *judicial districts,* utility districts, as well as state legislatures." S.Rep. 417 at 151, 1982 U.S.Code Cong. & Admin. News 323 (emphasis added). While the above statement by Senator Hatch is not a definitive description of the scope of the Act, we believe the statement provides persuasive evidence of congressional understanding and belief that section 2 applies to the judiciary, especially since the Report is silent as to any dissent by senators from Senator Hatch's description.

Additionally, the Senate and House hearings on the various bills regarding the extension of the Voting Rights Act in 1982 are replete with references to the election of judicial officials under the Act. The references primarily occur in the context of statistics presented to Congress indicating advances or setbacks of minorities under the Act. The statistics chart the election of minorities to various elected positions, including judges. *See Extension of the Voting Rights Act: Hearings on H.R. 1407, H.R. 1731, H.R. 2942, and H.R. 3112, H.R. 3198, H.R. 3473 and H.R. 3498 Before the Subcomm. on Civil and Constitu-*

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to legislators. The better analysis is that Congress did not use the term "representatives" with a specific intent to limit the section's application to any elected officials. Had Congress wished to do so, it could have easily promulgated express language to effectuate that intent.

tional Rights of the House Comm. on the Judiciary, 97th Cong. 1st sess. 38, 193, 239, 280, 503, 574, 804, 937, 1182, 1188, 1515, 1528, 1535, 1745, 1839, 2647 (1981); *Voting Rights Act: Hearings on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong.2d Sess. 669, 748, 788-89 (1982). Once again, the legislative history does not reveal any dissent from the proposition that such statistics were properly considered by Congress in amending the Act. Finally, throughout the Senate Report on the 1982 amendments to section 2, Congress uses the terms "officials," "candidates," and "representatives" interchangeably when explaining the meaning and purpose of the Act. This lack of any consistent use of the term "representatives" indicates that Congress did not intentionally choose that term in an effort to exclude certain types of elected officials from the coverage of the Act.

In contrast to the examples of legislative history which plaintiffs cite in support of their position that section 2 applies to state judicial elections, the State offers no convincing evidence in the legislative history contrary to the plaintiff's interpretation of the Act. Instead, the State relies primarily on the plain meaning of the word "representative" to assert that judges are exempt from the Act. The State's position is untenable.[5] Judges, while not "rep-

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5. The State asserts that the Dole compromise prohibiting proportional representation evidences congressional intent that § 2 only apply to legislative officials. Proportional representation, the State continues, is relevant to the legislature; therefore, Congress intended § 2 to apply only to the election of legislators. However, what belies the State's argument is that

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resentatives" in the traditional sense, do indeed reflect the sentiment of the majority of the people as to the individuals they choose to entrust with the responsibility of administering the law. As the district court held in *Martin v. Allain*:

> [J]udges do not "represent" those who elect them in the same context as legislators represent their constituents. The use of the word "representatives" in Section 2 is not restricted to legislative representatives but denotes anyone selected or chosen by popular election from among a field of candidates to fill an office, including judges.

658 F.Supp. at 1200.

C. *Section 5 and Section 2*

The plaintiffs further support their position that judicial elections are covered by section 2 by citing to the recent case of *Haith v. Martin*, 618 F.Supp. 410 (E.D.N.C. 1985), *aff'd*, 477 U.S. 901, 106 S.Ct. 3268, 91 L.Ed.2d 559 (1986), wherein the district court held that judicial elections are covered by section 5 and the preclearance requirements of the Act. In *Haith*, the defendant state offi-

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proportional representation may occur in any election wherein the people elect individuals to compromise a group. For instance, Louisiana elects seven Justices to comprise the Supreme Court. Certainly, the prohibition on proportional representation in § 2(b) applies in such a situation to prevent a legal requirement that the number of blacks on the Louisiana Supreme Court correspond to the percentage of blacks in the Louisiana population. Moreover, the State conceded at oral argument that executive officials could be covered by § 2, underlying their assertion that congressional fear of proportional representation evidenced intent that § 2 only apply to the legislature.

cials sought to exempt the election of superior court judges in North Carolina from the preclearance requirements of section 5 by relying on the cases holding that the one person, one vote principle does not apply to the judicial branch of government. In an analysis strikingly similar to that employed by the Court in *Voter Information*, the district court in *Haith* rejected the defendants' arguments as misplaced due to the fact that the plaintiff's claim was one based on discrimination, not malapportionment. The *Haith* court stated "[a]s can be seen, the Act applies to all *voting* without any limitation as to who, or what, is the object of the vote." 618 F.Supp. at 413. *See also Kirksey v. Allain*, 635 F.Supp. 347, 349 (S.D.Miss.1986) ("Given the expansive interpretation of the Voting Rights Act and § 5, this Court is compelled to agree with the pronouncement in *Haith v. Martin*" that section 5 applies to the judiciary.)

In the instant case, the State argues that the Supreme Court's affirmance of *Haith* does not compel a conclusion that section 2 applies to judicial elections as section 5 involves the mechanics of voting, while section 2 involves the fundamental right to vote for those who govern. We reject this asserted distinction. If, for instance, Louisiana were to enact an election statute providing that no blacks would be able to vote in elections for Louisiana Supreme Court Justices, it is undisputed, after *Haith*, that such a statute would be invalidated under the preclearance requirements of section 5. To hold, as the State asserts, that such an egregious statute would not be subject to the requirements of section 2 as well would lead to the incongruous result that, while Louisiana could not adopt such a statute in 1988, if that statute were in effect prior to

1982, minorities could only challenge the statute under the Constitution and not the Voting Rights Act. Such a result would be totally inconsistent with the broad remedial purpose of the Act. Moreover, section 5 and section 2, virtually companion sections, operate in tandem to prohibit discriminatory practices in voting, whether those practices originate in the past, present, or future. Section 5 contains virtually identical language defining its scope to that of section 2—"any voting qualification or prerequisite to voting, or standard, practice, or proceedure with respect to voting. . . ." Therefore, statutory construction, consistency, and practicality point inexorably to the conclusion that if section 5 applies to the judiciary, section 2 must also apply to the judiciary. *See Pampanga Mills v. Trinidad*, 279 U.S. 211, 217-18, 49 S.Ct. 308, 310, 73 L.Ed. 665 (1929).

D. *The Attorney General's Interpretation*

In *United States v. Sheffield Board of Commissioners*, 435 U.S. at 131, 98 S.Ct. at 979, the Supreme Court concluded that the contemporaneous construction of the Act by the Attorney General is persuasive evidence of the original congressional understanding of the Act, "especially in light of the extensive role the Attorney General played in drafting the statute and explaining its operation to Congress." Since its inception, the Attorney General has consistently supported an expansive, not restrictive, construction of the Act. Testifying at congressional hearings prior to the passage of the Act in 1965, the Attorney General stated that "every election in which registered voters are permitted to vote would be covered" by the Act. *Voting Rights: Hearing Before Subcomm. No. 5 of*

the House Judiciary Comm., 89th Cong. 1st Sess. (1965), at 21. *See also Allen*, 393 U.S. at 566-67, 89 S.Ct. at 832-33. Continuing the trend of broadly interpreting the Act to further its remedial purpose, the Attorney General has filed an amicus curiae brief in the instant case in which he maintains that the "plain meaning of [the language in section 2] reaches all elections, including judicial elections" and that the pre-existing coverage of section 2 was not limited by the 1982 congressional amendments. This construction of the Act by the Attorney General further bolsters our holding today that section 2 does apply to state judicial elections.

E. *Plaintiffs' Constitutional Claims*

Plaintiffs also appeal the district court's dismissal of their constitutional claims for failure to plead specific discriminatory intent. In their complaint, plaintiffs allege, in pertinent part:

> The defendant's actions are in violation of the Fourteenth and Fifteenth amendments to the United States Constitution and 42 U.S.C. Section 1983 in that the purposes and effect of their actions is to dilute, minimize, and cancel the voting strength of the plaintiffs.

[2, 3] In the instant case, the district court was correct in concluding that discriminatory purpose is a prerequisite to recovery under the fourteenth and fifteenth amendments. *See Washington v. Davis*, 426 U.S. 229, 239-41, 96 S.Ct. 2040, 2047-48, 48 L.Ed.2d 597 (1976). However, the district court erred in finding that plaintiffs' complaint did not establish a theory of "discriminatory intent." In *Voter Information*, this Court held that if "plaintiffs can prove that the purpose and operative ef-

fect of such purpose" of the challenged electoral practices is to dilute minority voting strength, the plaintiffs are entitled to some form of relief. *Voter Information*, 612 F.2d at 212. When compared with the complaint in *Voter Information*, the plaintiffs' complaint in the instant case is sufficient to raise a claim of racial discrimination under the fourteenth and fifteenth amendments.[6]

III. CONCLUSION

Where racial discrimination exists, it is not confined to elections for legislative and executive officials; in such instance, it extends throughout the entire electoral spectrum. Minorities may not be prevented from using section 2 in their efforts to combat racial discrimination in the election of state judges; a contrary result would prohibit minorities from achieving an effective voice in choosing those individuals society elects to administer and interpret the law. The right to vote, the right to an effective voice in our society, cannot be impaired on the basis of race in

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6. In *Voter Information*, the plaintiffs' complaint alleged,

> 25. The sole purpose of the present at-large system of election of City Judge is to ensure that the white majority will continue to elect all white persons for the office of City Judge.
>
> 26. The present at-large system was instituted when "Division B" was created as a reaction to increasing black voter registration and for the express purpose of diluting and minimizing the effect of the increased black vote.
>
> 27. In Baton Rouge, there is a continuing history of "bloc voting" under which when a black candidate opposes a white candidate, the white majority consistently casts its votes for the white candidate, irrespective of relative qualifications.

612 F.2d at 211.

any instance wherein the will of the majority is expressed by popular vote.

For the reasons set forth above, we reverse the judgment of the district court and remand for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-3463

RONALD CHISOM, MARIE BOOKMAN, WALTER WILLARD, MARC MORIAL, LOUISIANA VOTER REGISTRATION/EDUCATION CRUSADE and HENRY A. DILLON, III,

Plaintiffs-Appellants,

versus

EDWIN EDWARDS, in his capacity as Governor of the State of Louisiana, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

(May 27, 1988)

Before BROWN, JOHNSON, and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED. The Court further orders that the mandate shall issue forthwith.

ENTERED FOR THE COURT:

/s/ SAM D. JOHNSON
United States Circuit Judge

Ronald CHISOM, et al.

v.

Edwin EDWARDS, et al.

Civ. A. No. 86-4075.

United States District Court,
E.D. Louisiana.

May 1, 1987.

As Amended July 10, 1987.

Class action suit was filed on behalf of all blacks registered to vote in Louisiana parish, challenging process of electing Louisiana Supreme Court justices for particular district. Defendants moved to dismiss. The District Court, Charles Schwartz, Jr., J., held that: (1) judges were not "representatives" within meaning of § 2 of Voting Rights Act, and (2) complaint did not sufficiently allege intent to discriminate in violation of Fourteenth and Fifteenth Amendment.

Motion granted.

1. Elections 12(1)

Judges are not "representatives" within meaning of section of Voting Rights Act referring to right to elect representatives; by their very definition, judges do not represent voters but are appointed or elected to preside and to administer law. Voting Rights Act of 1965, § 2 et seq., 42 U.S.C.A. § 1973 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

2. Civil Rights 13.12(3)

Elections 12(9)

Complaint lacked allegations required for claims of Fourteenth and Fifteenth Amendment violations from system of election of state Supreme Court justices, where it did not allege that system was instituted with specific intent to discriminate. U.S.C.A. Const.Amends. 14, 15.

William P. Quigley, Ron Wilson, Roy Rodney, New Orleans, La., C. Lani Guinier, Pamela S. Karlan, New York City, for plaintiffs.

William J. Guste, Jr., Atty. Gen. Eavelyn T. Brooks, Asst. Atty. Gen., Louisiana Dept. of Justice, M. Truman Woodward, Jr., Black (sic) G. Arata, A.R. Christovich, Moise W. Dennery, New Orleans, La., for defendants.

OPINION

CHARLES SCHWARTZ, Jr., District Judge.

This matter is before the Court on defendants' motion to dismiss for failure to state a claim upon which relief can be granted pursuant to F.R.Civ.P. 12(b)(6). For the foregoing reasons, defendants' motion is GRANTED.

FACTS AND ALLEGATIONS

Ronald Chisom, four other black plaintiffs and the Louisiana Voter Registration Education Crusade filed this class action suit on behalf of all blacks registered to vote in Orleans Parish. Plaintiffs' complaint challenges the process of electing Louisiana Supreme Court Justices from the First District of the State Supreme Court. The com-

plaint alleges that the system of electing two at-large Supreme Court Justices from the Parishes of Orleans, St. Bernard, Plaquemines and Jefferson violates the 1965 Voting Rights Act, as amended, 42 U.S.C. § 1973 et seq., the fourteenth and fifteenth amendments to the United States Federal Constitution and, finally, 42 U.S.C. § 1983. Plaintiffs argue that the election-system impermissibly dilutes, minimizes and cancels the voting strength of blacks who are registered to vote in Orleans Parish.

More specifically, plaintiffs' original and amended complaint avers that the First Supreme Court District of Louisiana contains approximately 1,102,253 residents of which 63.36%, or 698,418 are white, and 379,101, or 34.4% are black. The First Supreme Court District has 515,103 registered voters, of which 68% are white, and 31.61% are black. Plaintiffs contend that the First Supreme Court District of Louisiana should be divided into two single districts. Plaintiffs suggest that because Orleans Parish's present population is 555,515 persons, roughly half the present First Supreme Court District, the most logical division is to have Orleans Parish elect one Supreme Court Justice and the Parishes of Jefferson, St. Bernard and Plaquemine together elect the other Supreme Court Justice. If plaintiffs' plan were to be carried out, plaintiffs contend the present First Supreme Court District encompassing only Orleans Parish would then have a black population and voter registration comprising a majority of the district's population. More specifically, plaintiffs assert presently 124,881 of the registered voters in Orleans are white, comprising 47.9% of the plaintiffs' proposed district's voters; while 134,492 of the registered voters in Orleans are now black, comprising 51.6% of the

envisioned district's voters. The other district comprised of Jefferson, Plaquemines and St. Bernard parishes and would have a substantially greater white population than black, according to plaintiffs' plan.

Plaintiffs seek class certification of approximately 135,000 black residents of Orleans Parish, whom plaintiffs allege suffer from diluted voting strength as a result of the present at-large election system. Additionally, plaintiffs seek a preliminary and permanent injunction against the defendants restraining the further election of Justices for the First Supreme Court District until this Court makes a determination on the merits of plaintiffs' challenge. Further, plaintiffs seek an order requiring defendants to reapportion the First Louisiana Supreme Court in a manner which "fairly recognizes the voting strengths of minorities in the New Orleans area and completely remedies the present dilution of minority voting strength." (Plaintiffs' Complaint, p. 7). Plaintiffs also seek an order requiring compliance with the Voting Rights Act and, finally, a declaration from this Court that the Supreme Court election system violates the Voting Rights Act and the fourteenth and fifteenth amendments to the Federal Constitution.[1]

Defendants do not dispute the figures presented by plaintiffs in their amended complaint. Instead, they con-

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1. Plaintiffs, earlier, sought a three judge court to hear this complaint which was denied by this Court as the terms of 28 U.S.C. § 2284 provide for a three judge court when the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body is challenged. Nowhere does § 2284 provide for convening a three judge court when a judicial apportionment is challenged.

tend that section 2 of the Voting Rights Act of 1965, as amended, the fourteenth and fifteenth amendments to the United States Federal Constitution and 42 U.S.C. § 1983 fail to provide plaintiffs grounds upon which relief can be granted for plaintiffs' allegation of diluted black voting strength.

SECTION 2 OF THE VOTING RIGHTS ACT OF 1965 DOES NOT APPLY TO THE INSTANT ACTION

Prior to 1982, section 2 of the Voting Rights Act (42 U.S.C. § 1973), "Denial or Abridgement of Rights to Vote on Account of Race or Color Through Voting Qualifications or Prerequisites," read as follows:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure, shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973(b)(f)(2) of this title.

Section 2 of the Voting Rights Act was amended as a response to *City of Mobile, Alabama v. Bolden,* 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed. 47 (1980), in which the Supreme Court in a plurality opinion held to establish a violation of section 2 of the Voting Rights Act, minority voters must prove the contested electoral mechanism was intentionally adopted or maintained by state officials for a discriminatory purpose. After *Bolden,* Congress in 1982 revised section 2 to make clear that a violation of the Voting Rights Act could be proven by showing a discriminatory effect or result alone. *United States v. Marengo County Commission,* 731 F.2d 1546 n. 1 (11th Cir. 1984), *appeal dismissed,*

cert. denied, 469 U.S. 976, 105 S.Ct. 375, 83 LEd.2d 311 (1984).[2] Section 2, as amended, 96 Stat. 134, now reads:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the rights of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2), as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination for election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to *elect representatives of their choice.* The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, that nothing in this section establishes a right to have members of a protective class elected in numbers equal to their proportion in the population. 42 U.S.C. § 1973 (emphasis added).

Prior to the 1982 amendments to section 2, a three-judge court composed of Judges Ainsworth, West and Gordon, headed by Judge West, addressed a voting rights claim arising out of the same claims of discrimination as

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2. See S.Rep. 97-417, 97 Cong.2d Sess (1982) pp. 15-43, U.S. Code Cong. & Admin.News 1982, p. 177, for a complete discussion of Congress' intent to overturn the section 2 "purposeful discrimination" requirement imposed by *Mobile v. Bolden.*

in this case, albeit not in a section 2 context. *Wells v. Edwards*, 347 F.Supp. 453 (M.D.La.1972), *aff'd*, 409 U.S. 1095, 93 S.Ct. 904, 34 L.Ed.2d 679 (1973). In *Wells*, a registered black voter residing in Jefferson Parish, brought suit seeking a reapportionment of the judicial districts from which the seven judges of the Supreme Court of Louisiana are elected. Ms. Wells sought an injunction enjoining the state from holding the scheduled Supreme Court Justice elections and an order compelling the Louisiana Legislature to enact an apportionment plan in accordance with the "one man, one vote" principle and to reschedule the pending election. On cross motions for summary judgment, the three-judge court stated, "We hold that the concept of one-man, one vote apportionment does not apply to the judicial branch of government." 342 F.Supp. at 454. The *Wells* court took notice of *Hadley v. Junior College District*, 397 U.S. 50, 90 S.Ct. 791, 25 L.Ed.2d 45 (1970), in which the Supreme Court held, "Whenever a state or local government decides to select persons by popular election *to perform governmental functions*, the equal protection clause of the fourteenth amendment requires that each qualified voter must be given an equal opportunity to participate in that election. . . .", 90 S.Ct. 791, 795 (emphasis added), but distinguished its holding by outlining the special functions of judges.

The *Wells* court noted many courts' past delineations between elected officials who performed legislative or executive functions and judges who apply, but not create, law[3] and concluded:

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3. *See, e.g., Stokes v. Fortson*, 234 F.Supp. 575 (N.D.Ga.1964) ("Manifestly, judges and prosecutors are not representative

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> 'Judges do not represent people, they serve people.' Thus, the rationale behind the one-man, one-vote principle, which evolved out of efforts to preserve a truly representative form of government, is simply not relevant to the makeup of the judiciary.

347 F.Supp. at 455.

The *Wells* opinion interpreted the "one man one vote" principle prior to the 1982 amendments to section 2, which added the phrase, "[T]o elect representatives of their choice."[4] *See* emphasis in quotation 42 U.S.C. 1973, *supra.*) The legislative history of the 1982 Voting Rights Act amendments does not yield a definitive statement noting why the word "representative" was added to section 2. However, in this case, no such statement is necessary, as "to elect representatives of their choice" is clear and unambiguous.

[1] Judges, by their very definition, do not represent voters but are "appointed [or elected] to preside and to administer the law." *Black's Law Dictionary,* 1968. As statements by Hamilton in the *Federalist,* No. 78 reflect, the distinction between Judge and representative has long been established in American legal history:

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in the same sense as they are legislators or the executive. Their function is to administer the law, not to espouse a cause of a particular constituency"); *Holshouser v. Scott,* 335 F.Supp. 928 (D.D.C.1971) ("We hold that the one man, one vote rule does not apply to state judiciary. . . ."); *Buchanan v. Rhodes,* 249 F.Supp. 860 (N.D.Ohio1966) ("Judges do not represent people, they serve people"); *New York State Assn. of Trial Lawyers v. Rockefeller,* 267 F.Supp. 148, 153 (S.D.N.Y. 1967) ("The state judiciary, unlike the legislature, is not the organ responsible for achieving representative government.")

4. This language did not appear in section 2 at the time of the *Wells* opinion.

> If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the constitution. It is not otherwise to be supposed that the constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. . . .

Indeed, our Federal Constitution recognizes the inherent difference between representatives and judges by placing the federal judiciary in an entirely different category from that of other federal elective offices. It is noteworthy that articles 1 and 2, which establish Congress and the Presidency, are lengthy and detailed, while Article 3, which establishes the judiciary, is brief and free of direction, indicating the judiciary is to be free of any instructions. Today, Fifth Circuit jurisprudence continues to recognize the long established distinction between judges and other officials. *See, e.g., Morial v. Judiciary Committee of State of Louisiana*, 565 F.2d 295 (5th Cir.1977) *en banc, cert. denied*, 435 U.S. 1013, 98 S.Ct. 1887, 56 L.Ed. 2d 395 (1978). (See also Footnote 1, *supra.*)

The legislative history of the Voting Rights Act Amendments does not address the issue of section 2 apply-

ing to the judiciary,[5] indeed, most of the discussion concerning the application of the Voting Rights Act refers to legislative offices. Nevertheless plaintiffs ignore the historical distinction between representative and judge and the lack of any discernible legislative history in their favor and argue that the Voting Rights Act is a broad and remedial measure which must be extended to cover judicial election systems.[6] Plaintiffs rely principally on *Haith v. Mar-*

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5. The Chairman of the Senate Judiciary Committee's Subcommittee on the Constitution, Senator Orrin Hatch, in voicing his strong opposition of the Legislative reversal of *Bolden* through the section 2 revisions, made a brief reference to section 2 applying to judicial elections:

> Every political subdivision in the United States would be liable to have its electoral practices and procedures evaluated by the proposed results test of section 2. It is important to emphasize at the onset that for the purposes of Section 2, the term "political subdivision" encompasses all governmental units, including city and county councils, school boards, judicial districts, utility districts, as well as state legislatures.

S.Rep. 97-417, 97 Cong.2d Sess. 127, 151, *reprinted in* 1982 U.S.Code Cong. & Admin.News 298, 323.

Although Senator Hatch's comment indicates coverage of judicial districts by the Voting Rights Act, the purpose of the above passage was to illustrate Senator Hatch's belief that the impact of the section 2 Amendments' "results test" would be far ranging and in his opinion, detrimental. Senator Hatch's comments were included at the end of the Senate report usually reserved for dissenting Senators. The above passage did not portend to be a definative or even a moderately detailed description of the coverage of the Voting Rights Act, nor does Senator Hatch provide any authority for his suggestion of the potential scope of section 2. Rather, this Court finds that the passage was meant to be argumentative and persuasive, and not as a means to define actual scope of the Act.

6. *See e.g., United Jewish Organization of Williamsburg, Inc. v. Carey*, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977)

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tin, 618 F.Supp. 410 (D.N.C.1985) (three-judge court), *aff'd*, without opinion, 106 S.Ct. 3268, 91 L.Ed.2d 559 (1986) for the proposition that this Court should ignore *Wells v. Edwards*, *supra*, and apply section 2 to the allegations contained in their complaint.[7] In *Haith*, the district court held that judicial election systems are covered by section 5 of the Voting Rights Act, which requires preclearance by the U.S. Justice Department of any voting procedures changes in areas with a history of voting discrimination. Plaintiffs, in essence, argue that because the Supreme Court, without opinion, affirmed the *Haith* district court in its application of section 5 to judicial elections, this Court should expand the holding of *Haith* to include section 2 of the Voting Rights Act. Plaintiffs' argument fails because section 5 does not specifically restrict its application to election systems pertaining to representatives, a restriction included in the 1982 amendments to section 2.

Although a potential conflict may develop between the holdings in *Wells* and *Haith*, *Wells* clearly states the "one

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("It is apparent from the face of the Act, from its legislative history, and from our cases of the Act itself was broadly remedial in the sense that it 'was designed by Congress to banish the blight of racial discrimination in voting . . .' "), 430 U.S. at 156, 97 S.Ct. at 1005; *South Carolina v. Katzenback*, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966) (The Voting Rights Act "reflects Congress' firm intention to rid the country of racial discrimination in voting"), 383 U.S. at 315, 86 S.Ct. at 811.

7. Plaintiffs also rely on *Kirksey v. Allian*, 658 F.Supp. 1153 (S.D.Ms.1987), in which a district court dismissed the reasoning in *Wells*, and held section 2 does apply to the elected judiciary. *Wells*, *supra*, has precedential authority and clearly conflicts with *Kirksey*, an untested lower court opinion.

man one vote" principle is *not* applicable to judicial elections. This Court recognizes the long standing principle that the judiciary, on all levels, exists to interpret and apply the laws, that is, judge the applicability of laws in specific instances. Representatives of the people, on the other hand, write laws to encompass a wide range of situations. Therefore, decisions by representatives must occur in an environment which takes into account public opinion so that laws promulgated reflect the values of the represented society, as a whole. Judicial decisions which involve the individual or individuals must occur in an environment of impartiality so that courts render judgments which reflect the particular facts and circumstances of distinct cases, and not the sweeping and sometimes undisciplined winds of public opinion.

PLAINTIFFS' FOURTEENTH AND FIFTEENTH AMENDMENT CLAIMS FAIL TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AS PLAINTIFFS DO NOT PLEAD DISCRIMINATORY INTENT

The appropriate constitutional standard for establishing a violation of the fourteenth amendment in the context of voting rights is "purposeful discrimination." *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977);[8] *McMillian v. Escambia City, Fla.*, 688 F.2d 960 (5th Cir.

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8. In *Village of Arlington Heights v. Metropolitan Housing Corp.*, purposeful discrimination was held the standard necessary to establish a violation of the fourteenth amendment where plaintiff claimed a village rezoning decision was racially discriminatory.

1982).[9] Similarly, *City of Mobile, Alabama v. Bolden, supra,* requires a court to establish a finding of discriminatory purpose before declaring a fifteenth amendment violation of voting rights.[10]

In *Voter Information Project,* 612 F.2d 208 (5th Cir. 1980), a panel composed of Judges Jones, Brown and Rubin (opinion by Judge Brown) held a suit that alleged the at-large scheme for electing city judges in Baton Rouge invidiously diluted the voting strength of black persons in violation of the fourteenth and fifteenth amendments to

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9. In *McMillian v. Escambia City, Fla.,* the Fifth Circuit held the *Arlington Heights'* "purposeful discrimination" standard is appropriate in fourteenth amendment voter discrimination claims.

10. Although there is a conflict between the requirement of "discriminatory effect" in Section 2, which is intended to enforce the fifteenth amendment, and the requirement of "purposeful discrimination" for a fifteenth amendment violation standing alone, the Senate Judiciary Committee addressed this point and recognized Congress' limited ability to adjust the burden of proving Voting Rights Violations in its "Voting Rights Act Extension" Committee Report.

> Certainly, Congress cannot overturn a substantive interpretation of the Constitution by the Supreme Court. Such rulings can only be altered under our form of government by constitutional amendment or by a subsequent decision by the Supreme Court.
>
> Thus Congress cannot alter the judicial interpretations in *Bolden* of the fourteenth and fifteenth amendments by simple statute. But the proposed amendment to Section 2 does not seek to reverse the court's constitutional interpretation.

S.Rep. 97-417, 97 Cong.2d Sess. (1982), p. 41, U.S.Code Cong. & Admin.News 1982, p. 219. The Supreme Court, the only body empowered to interpret the Federal Constitution, has not seen fit to overrule its repeated determination that the fourteenth and fifteenth amendments claims require "purposeful discrimination."

the United States Federal Constitution, and 42 U.S.C. § 1983, could not be dismissed when the complaint alleges purposeful discrimination. At the trial level, Judge West relied on his reasoning in *Wells, supra,* that the one man, one vote principle did not apply to the elections of judges, and dismissed plaintiffs' suit. Judge Brown reversed, holding that the "one man, one vote" principle as espoused in *Wells, supra,* was not enough to dismiss plaintiff's complaint. The *Voter Information Court* found:

> The problem with the District Court's opinion, however, is that it assumes the "one man, one vote" principle was the exclusive theory of plaintiff's complaints. In addition to a rather vaguely formulated "one man, one vote" theory, plaintiffs contend that both in design and operation, the at-large schemes dilute the voting strength of black citizens and prevent blacks from being elected as judges. As the complaint attacking the city judge election system alleges:
>
> > 25. The sole purpose of the present at-large system of election of City Judge is to insure that the white majority will continue to elect all white persons for the offices of City Judge.
> >
> > 26. The present at-large system was instituted when "Division B" was created as a reaction to increasing black voter registration and for the express purpose of diluting and minimizing the effect of the increased black vote.
> >
> > 27. In Baton Rouge, there is a continuing history of "bloc voting" under which when a black candidate opposes a white candidate, the white majority consistently casts its votes for the white candidate, irrespective of the relative qualifications.
>
> Plaintiffs contend that since most of the black population of Baton Rouge and E. Baton Rouge Parish is concentrated in a few geographic areas, black citizens

> could, under a single member district plan, elect at least some black judges.

612 F.2d at 211.

The *Voter Information Project* Court held the plaintiff's complaint contained sufficient allegations of intentional discrimination against black voters to survive a motion to dismiss: "If plaintiffs can prove that the purpose and operative effect of such purpose of the at-large election schemes in Baton Rouge is to dilute the voting strength of black citizens, then they are entitled to some form of relief." 612 F.2d at 212. Thus, the *Voter Information Project* requires that "purpose and operative effect" be pled in a fourteenth and fifteenth amendment challenge to a judicial apportionment plan.

[2] The complaint in the instant case states, in pertinent part:

> Because of the official history of racial discrimination in Louisiana's First Supreme Court District, the wide spread prevalence of racially polarized voting in the district, the continuing effects of past discrimination on the plaintiffs, the small percentage of minorities elected to public office in the area, the absence of any black elected to the Louisiana Supreme Court from the First District, and the lack of any justifiable reason to continue the practice of electing two Justices at-large from the New Orleans area only, plaintiffs contend that the current election procedures for selecting Supreme Court justices from the New Orleans area dilutes minority voting strength and therefore violates the 1965 Voting Rights Act, as amended.

(See Plaintiffs' Complaint, p. 5). Later on, the Complaint alleges:

> The defendants' actions are in violation of the Fourteenth and Fifteenth Amendment to the United States Constitution and 42 U.S.C. § 1983 in that the purpose and effect of their actions is to dilute, minimize, and cancel the voting strength of the plaintiffs.

(*Id.*, p. 6.)

Although "purpose and effect" language in the second quotation above broadly read may imply plaintiffs' intention to plead discriminatory intent, it is this Court's considered opinion, based on the complaint as a whole, that plaintiffs intend to prove this claim based on a theory of "discriminatory effect" and not on a theory of "discriminatory intent." *City of Mobile Alabama v. Bolden, supra.* For example, plaintiffs' complaint does not allege the system by which the Louisiana Supreme Court Justices are elected was instituted with specific intent to discriminate. This contrasts with the specific allegations in *Voter Information Project, supra.* Accordingly, plaintiffs lack the requisite allegations in order to prove a violation of the fourteenth or fifteenth amendment to the Federal Constitution. The Court reserves the right for plaintiffs to reurge its fourteenth and fifteenth amendment claims as they relate to the Court's ruling that plaintiffs' complaint only alleges "discriminatory effect."

Accordingly, unless plaintiffs' complaint is amended within ten (10) days of the date of entry of this opinion, the Clerk of Court is directed to enter judgment DISMISSING plaintiffs' claim at their cost.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-3492

RONALD CHISOM, ET AL.,

Plaintiffs-Appellees,

versus

BUDDY ROEMER, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Louisiana

(August 19, 1988)

Before CLARK, Chief Judge, GARZA and POLITZ, Circuit Judges.

POLITZ, Circuit Judge:

On August 3, 1988, following an expedited appeal, we vacated the preliminary injunction issued by the district court which had enjoined the election of a justice of the Louisiana Supreme Court from the First Supreme Court District, and ordered that "said election shall be conducted in accordance with the laws of the State of Louisiana at the times and in the manner specified therein." Consistent with a reservation then made, we now assign our reasons for that decision.

Background

On September 19, 1986 complainants, black registered voters in Orleans Parish, Louisiana, and an organization active in voting-rights issues, filed the instant suit, alleging that the present system of electing two justices to the Louisiana Supreme Court from the First Supreme Court District violates section 2 of the Voting Rights Act of 1965 as amended.[1] Their complaint was met with a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, which the court granted, essentially based on the conclusion that section 2 did not apply to judicial elections.[2] On appeal we reversed and remanded.[3]

After an application for panel rehearing and for a rehearing en banc was declined, the case was returned to the district court. Thereafter, complainants applied for a preliminary injunction to prevent the election scheduled for October 1, 1988 of a justice from the First Supreme Court District, a position held by Justice Pascal F. Calogero, Jr. since 1972.[4] Based on the evidence presented[5]

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1. 42 U.S.C. § 1973, as amended June 29, 1982, 96 Stat. 134. The complaint also alleges violations of the fourteenth and fifteenth amendments but only section 2 of the Voting Rights Act is involved in the preliminary injunction.

2. 659 F.Supp. 183 (E.D.La. 1987). The court dismissed the constitutional claims for failure of allegations of discriminatory intent.

3. 839 F.2d 1056 (5th Cir. 1988). All claims were reinstated.

4. Justice Calogero is the ranking Supreme Court justice, in terms of service, second only to Chief Justice John A. Dixon, Jr.

5. As observed by a member of this panel during oral argument, defendants made little attempt to offer evidence or other

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the district judge concluded that the election should be enjoined. Defendants appealed and sought a stay pending appeal, Fed.R.App.P. 8. A divided motions panel of this court expedited the appeal and stayed the injunction to the extent it related to the qualifying activities of candidates. As noted, after hearing the expedited appeal this merits panel vacated the remainder of the preliminary injunction.

Factual Context

The thoughtful and comprehensive opinion of the trial court, which gleans the sparse record and reaches out and takes judicial notice of other relevant judicially-found facts,[6] reveals the following scenario.

The Supreme Court of Louisiana is composed of "a chief justice and six associate justices, four of whom must concur to render judgment," who are elected for ten-year terms.[7] The justices are elected from six Supreme Court districts, all of which are single-member districts except the First Supreme Court District which elects two justices,[8] a tradition dating back more than a century. The

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assistance to the trial court's efforts to decide the very difficult and serious issues presented by the application for a preliminary injunction.

6. Notably, the congressional redistricting case involving New Orleans and environs, brought pursuant to section 2 of the Voting Rights Act of 1965 as amended, Major v. Treen, 574 F.Supp. 325 (E.D.La. 1983) (three-judge court), a case in which a great volume of evidence, vigorously tested by the adversarial process, was presented to the court.

7. La. Const. of 1974, Art. 5, § 3.

8. La. Const. of 1974, Art. 5, § 4 (incorporating La. Const. of 1921, Art. 7, § 9); La. R.S. 13:101.

districts and the number of justices assigned to each are "subject to change by law enacted by two-thirds of the elected members of each house of the legislature."[9]

The First Supreme Court District is largely composed of the metropolitan New Orleans area and includes four parishes: Orleans, Jefferson, St. Bernard, and Plaquemines. This district is the largest in population, with a 1980 census total of 1,102,253. The next largest Supreme Court district has a 1980 census population of just over 861,000, while the smallest contains approximately 411,000 Louisianans. The average of the five other districts, using 1980 census figures, is 620,729.

In 1980, the most recent data available to the trial court, the four parishes in the First Supreme Court District had the following population distribution:

Orleans	557,515	(55.25% black)
Jefferson	454,592	(13.89% black)
St. Bernard	64,097	(3.73% black)
Plaquemines	26,049	(21.12% black)

Voter registration data as of March 31, 1987 reflected the following totals and percentages of black voters:

Orleans	251,359	(52.4% black)
Jefferson	199,534	(11.9% black)
St. Bernard	40,086	(3.9% black)
Plaquemines	15,198	(18.6% black)

As the trial court found, at present blacks comprise a majority of the total population, the voting-age population, and the registered voters in Orleans Parish. Orleans

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9. La. Const. of 1974, Art. 5, § 4.

Parish constitutes just over one-half of the total population of the First Supreme Court District.

The trial court concluded that complainants had satisfied the tetrad test for issuance of a preliminary injunction which was synthesized, although not originated, in the oft-cited case of *Canal Authority of Florida v. Callaway,* 489 F.2d 567, 572 (5th Cir. 1974), by showing:

(1) a substantial likelihood that plaintiff will prevail on the merits;

(2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted;

(3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant; and

(4) that granting the preliminary injunction will not disserve the public interest.

Analysis

Inasmuch as our decision is powered by a consideration of the essence and ramifications of the third and fourth factors, we pretermit a discussion of the first two, except for these limited comments. It remains to be seen whether the complainants will prevail on the merits, indeed the Supreme Court has yet to speak on the critical issue whether section 2 of the Voting Rights Act applies to judicial elections. And we can only speculate as to the state of the record in this case after trial on the merits.

As to irreparable injury, complainants urge a black-letter, *per se* rule to the effect that if an electoral standard, practice, or procedure abridges section 2 of the Voting Rights Act it automatically does irreparable injury to

all or a portion of the body politic. Some district courts would agree. *See Dillard v. Crenshaw County,* 640 F.Supp. 1347 (M.D.Ala. 1986); *Harris v. Graddick,* 593 F.Supp. 128 (M.D.Ala. 1984); *Cook v. Luckett,* 575 F.Supp. 479 (S.D.Miss. 1983). We do not. We are not prepared to adopt a *per se* rule in such a vital area of state-federal relations. While we recognize and are in full accord with the teachings of the Supreme Court in *Reynolds v. Sims,* 377 U.S. 533, 555 (1964), that "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise." We are also cognizant that " '[t]he possibility that . . . other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.' " *Sampson v. Murray,* 415 U.S. 61, 70, 945 S.Ct. 937, 39 L.Ed.2d 166 (1974) (*quoting Virginia Petroleum Jobbers Assn. v. FPC,* 104 U.S.App.D.C. 106, 110, 259 F.2d 921, 925 (1958)). In this we agree with the commentators who suggest that "[o]nly when the threatened harm would impair the court's ability to grant an effective remedy is there really a need for preliminary relief." Wright, Miller & Kane, *Federal Practice and Procedure* § 2948 at 431-34 (1973).

Should the election be enjoined?

Assuming *per arguendo* that there has been a prima facie showing of likelihood of success on the merits, and irreparable injury, our disposition of this appeal turns on

a negative response to the question: Does the public interest require that this election be enjoined? Would such an injunction be in the best interests of: all of the citizens of the State of Louisiana; the citizens of the First Supreme Court District; the black citizenry of Louisiana; that of the First Supreme Court District; or the black electorate of Orleans Parish? We are persuaded beyond peradventure that the answer must be a resounding "no" on behalf of all of these groupings of Louisianians.

Our analysis begins with the staunch admonition that a federal court should jealously guard and sparingly use its awesome powers to ignore or brush aside long-standing state constitutional provisions, statutes, and practices. There can be no doubt that under the Supremacy Clause,[10] federal courts do and indeed must have this authority in our unique form of government. It is the use of this power that must be maintained in the balance, a balance which is more delicate than usual when a state's judicial process is involved.

It cannot be gainsaid that federal courts have the power to enjoin state elections. *Watson v. Commissioner's Court of Harrison County,* 616 F.2d 105 (5th Cir. 1980); *Hamer v. Campbell,* 358 F.2d 215 (5th Cir.), *cert. denied,* 385 U.S. 851 (1966). But, "intervention by the federal courts in state elections has always been a serious business," *Oden v. Brittain,* 396 U.S. 1210 (1969) (Black, J., opinion in chambers), not to be lightly engaged in. Indeed, even after an adjudication on the merits that a legislative apportionment plan violated the Constitution, the Supreme Court invited the use of a velvet glove over the mailed fist:

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10. Constitution, Art. VI.

> In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree.

Reynolds v. Sims, 377 U.S. at 5850. *Sims* has been the guidon to a number of courts that have refrained from enjoining impending elections. In another instance, the Supreme Court stayed a district court's hand after a three-judge court found Indiana's multi-member districting provisions unconstitutional. *Whitcomb v. Chavis,* 396 U.S. 1055 and 396 U.S. 1064 (1970) (granting a stay pending appeal, 305 F.Supp. 1359, 1364 (S.D.Ind. 1969)). *See also Maryland Citizens v. Governor of Maryland,* 429 F.2d 606 (4th Cir. 1970); *Dillard v. Crenshaw County; Banks v. Bd. of Ed., City of Peoria,* 659 F.Supp. 394 (C.D.Ill. 1987); *Knox v. Milwaukee County,* 581 F.Supp. 399 (E.D.Wis. 1984).

We consider significant the Supreme Court's action in *Chavis.* In staying the reapportionment plan ordered by a three-judge court, the Supreme Court permitted the conduct of an election under the old scheme which had been found constitutionally infirm. In dissenting from the refusal to vacate their stay order, Justice Douglas pointedly stated: "The State contends that without a stay it will be forced to conduct the forthcoming election under the reapportionment plan of the District Court. By granting

the stay, however, this Court has equally forced the appellees to go through the election under the present scheme which was held unconstitutional by the District Court." 396 U.S. 1064. Nonetheless the court permitted the election to proceed.

The case at bar

Against this backdrop we consider the realities of the case at bar. The district court concluded that the issuance of an injunction would either be neutral, in ultimate result, or preferable to not enjoining the election. We do not find the court's reasoning persuasive. To the extent this is a factual finding by the trial court, we view it as clearly erroneous; to the extent it is a conclusion of law, we view it as erroneous.

Preventing this judicial election at this late stage is not a passive or neutral act. It is the proverbial gossamer-thin veil which is fraught with difficulties. The consequences to Louisiana's judicial system are as significant as they are uncertain. Indeed, the very uncertainties introduced account in large measure for the significance of the impact.

The core value of the law and its implementing judicial system is stability—the ability reasonably to anticipate the results of actions and proceedings, by individuals and by legal institutions. Staying the election for a justice of the First Supreme Court District casts a cloud over the Louisiana Supreme Court, as staying any judicial election would cast a cloud over the affected court. The Louisiana Constitution provides that the terms of the justices of its supreme court are ten years. The term of Justice Calogero expires on December 31, 1988. If the

regularly scheduled election did not go forward, would Louisiana have seven justices on its highest court on January 1, 1989? If the election is enjoined and Justice Calogero continues to serve, will there be any question about the validity of his actions as a justice?

The Louisiana Constitution prescribes that four justices must concur to render judgment. Decisions in both civil and criminal cases decided on a 4-3 basis are not a rarity. The sparse offerings by the state in defense of the application for the preliminary injunction include the affidavit of the Director of the Louisiana Supreme Court's Central Staff of attorneys. He advises that since 1976 the Louisiana Supreme Court has reviewed 82 death penalty appeals. In 30 of those appeals the conviction was reversed or the death sentence was vacated. Twenty percent of those reversals were decided on a 4-3 vote. The record does not contain statistics for 4-3 renditions in civil cases, or in the denial of writs of certiorari or review, which require the agreement of four justices,[11] but the number undoubtedly is very substantial. One need only thumb through a selective sampling of the Southern Reporter Second series for a feel of just how substantial that number is. What is the consequence if Justice Calogero is one of the four? Is an uncertainty introduced?

Does the general statutory provision declaring that public officers hold their offices until their successors are

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11. La. Const. of 1974, Art. 5, § 3.

"inducted into office"[12] apply in this instance? Our research reflects no case in which the Louisiana Supreme Court has applied this statute to a justice or judge. Until Louisiana's highest court resolves this question it remains just that, an open question and, as such, it casts a shadow on the functioning of the Louisiana Supreme Court.

Appellees and the trial court refer to the provision of the Louisiana Constitution which addresses the temporary posting of judicial vacancies. Article 5, § 22, provides that until a vacancy in a judicial office is filled "the supreme court shall appoint a person meeting the qualifications for the office . . . to serve at its pleasure. The appointee shall be ineligible as a candidate at the election to fill the vacancy." *Id.* § 22(B). If the election is enjoined, after midnight on December 31, 1988 is the post now held by Justice Calogero to be deemed vacant and subject to an appointment by his former-fellow justices? Because of the involvement of the federal court, and its preventing of the election, would this be a vacancy subject to appointment? If it is deemed such and Justice Calogero accepts an appointment, would he be eligible to seek reelection to the judicial post he has held since 1972 when the federal court did permit an election to proceed? More shadows on the otherwise clear patina of the Louisiana judicial system. Are such warranted? Can they be justified or permitted?

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12. La. R.S. 42:2 provides:

> Every public officer in this state except in case of impeachment or suspension, shall continue to discharge the duties of his office until his successor is inducted into office.

Further, in Article 5, § 6, the Louisiana Constitution establishes that "[t]he judge oldest in point of service on the supreme court shall be chief justice." Justice Calogero currently is second in point of service to the chief justice. If the election is enjoined and his office is deemed vacant, should he not be offered, or should he decline an appointment out of caution for the Article 5, § 22(B) proscription; if he is reelected, would his service have been interrupted so as to cause a forfeiture of his claim to be oldest in point of service?

Finally, what about the litigants during this period? What will be the racial demographics of that group? Will they be affected adversely? Will that effect be significant? Can it be justified?

Appellees suggest that the specter of problems with and for the Louisiana Supreme Court are manageable. The trial court states: "Regardless of the state constitutional provisions, this Court has in any event the power under the Supremacy Cause to fashion both preliminary and final equitable relief that will both provide plaintiffs with a full and adequate remedy and protect other important state interests."[2] Is this a suggestion that the chancellor will appoint a successor to Calogero, perhaps Calogero, and, out of a sense of fair play, decree that all state constitutional questions as to his service are to be taken for naught, that the proscription against his running for the office is nullified, and, further, order that no one may suggest a break in his service for purposes of eligibility for the office of chief justice? Is such necessary? Should the federal court even contemplate that scenario? We are most reluctant to do so.

Were we to countenance such a scenario, other interests would be disserved. As the *Dillard* court recognized, the extension of the terms of incumbents or the court's appointment of replacements, effectively denies "the entire electorate the right to vote and thus seem to offend basic principles. . . ." *Dillard,* 640 F.Supp. at 1363. *See also, Banks,* 659 F.Supp. at 402 ("enjoining the . . . election would have the effect of preventing all of the voters in the respective election districts from exercising their right to vote. . . .").

How long would this disenfranchisement of all of the voters of the First Supreme Court District continue? As discussed *infra,* this case must run its full course, and, thereafter, assuming violations are found, the Louisiana Legislature must be afforded an opportunity to repair the defects the court discloses. Is the electorate to have no say whatever as to the person to serve during that period? Can that conceivably be considered in the best interests of the citizenry?

In addition to the foregoing caution to the use of injunctive powers before trial on the merits, and indeed even after trial on the merits, we are also keenly mindful of another well-established rubric which must be brought to bear in the resolution of the present conundrum. It is now established beyond challenge that upon finding a particular standard, practice, or procedure to be contrary to either a federal constitutional or statutory requirement, the federal court must grant the appropriate state or local authorities an opportunity to correct the deficiencies. In *Reynolds v. Sims* the Supreme Court commended the district court for refraining from enjoining an impending

election until the Alabama Legislature had been given an opportunity to remedy the defects in their legislative apportionment scheme. 377 U.S. at 586. Further, after trial on the merits, and a declaration that an existing election scheme is unlawful, it is "appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional [or federal statutory] requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan." *Wise v. Lipscomb*, 437 U.S. at 540. *See also McDaniel v. Sanchez*, 452 U.S. 130, 150 n.30 (1981) ("Moreover, even after a federal court has found a districting plan unconstitutional, 'redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to preempt,'" *quoting Wise v. Lipscomb*). The court goes on to cite authorities for the proposition that the legislatures should first be given a chance, and quoting *Reynolds v. Sims*, the *Sanchez* court noted that "judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." 452 U.S. at 150 n.30); *Connor v. Finch*, 431 U.S. 407 (1977); *Major v. Treen*.

As found by the district court, the Louisiana Legislature has signaled no reluctance to address this matter. When this court held that section 2 applied to judicial elections, remedial legislation was offered and seriously considered in the just-recessed legislative session. This legislature gives every indication of promptly responding to a need for action should it occur.

We understand these precedents to mandate that the responsible state or local authorities must be first given an opportunity to correct any constitutional or statutory defect before the court attempts to draft a remedial plan. In the case at bar, that means that should the court rule on the merits that a statutory or constitutional violation exists the Louisiana Legislature should be allowed a reasonable opportunity to address the problem. We have no reason whatsoever to doubt that the governor and legislature will respond promptly. Such was the experience in the epilogue to *Major v. Treen.*

In the interim, we are convinced that the system in place for the election of the subject judicial officer should be left undisturbed. There are a number of variables and several contingencies. But notwithstanding their final alignment, at the appropriate time, should it become necessary, the federal courts may fashion whatever remedy the law, equity, and justice require.

The preliminary injunction is VACATED and it is ordered that the presently scheduled election for justice of the First Supreme Court District of Louisiana proceed in accordance with the laws of Louisiana.

No. 88-327

(2)

Supreme Court, U.S.
FILED
OCT 20 1988
JOSEPH E. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BUDDY ROEMER, *et al.*,

Petitioners,

v.

RONALD CHISOM, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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Question Presented

In amending section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, did Congress intend to exempt from scrutiny racially discriminatory methods of electing state court judges?

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No 88-327

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

BUDDY ROEMER, et al.,

Petitioners,

v.

RONALD CHISOM, et al.,

Respondents.

On Petition For A Writ of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

Respondents Ronald Chisom et al. oppose the petition of Governor Buddy Roemer et al. for a writ of certiorari to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on February 29, 1988.

Statement of the Case

The Louisiana Supreme Court consists of seven justices who are chosen by popular election. Five of the seven justices are elected from geographically defined single-member districts. The other two justices are elected from the only multi-member district--the First Supreme Court District. The First Supreme Court District contains Orleans, St. Bernard, Plaquemines, and Jefferson Parishes. Orleans Parish, which contains the city of New Orleans, is predominantly black in both total population and registered voters. The other three parishes are overwhelmingly white. Justices serve ten-year terms, and the election terms of the two justices from the First Supreme Court District are staggered. No black person has been elected to the Louisiana

Supreme Court, either from the First Supreme Court District or from any of the other five districts, in modern times.

Respondents Ronald Chisom, Marie Bookman, Walter Willard, Mark Morial, and Henry Dillon, III, are black registered voters in Orleans Parish, who represent a class of similarly situated persons. Respondent Louisiana Voter Registration/ Education Crusade is a nonprofit corporation active in voting rights issues in Orleans Parish.

Respondents filed a complaint challenging the method of electing Louisiana Supreme Court Justices from the First Supreme Court District. They alleged both that the present election scheme submerged Orleans Parish's predominantly black electorate in a majority-white, multimember district in violation of the "results test" of section 2 of the Voting

Rights Act of 1965 as amended, 42 U.S.C. § 1973, and that it violated the Fourteenth and Fifteenth Amendments to the Constitution of the United States because the purpose and effect of placing Orleans Parish in a multimember district was to dilute black voting strength.[1]

With regard to respondents' claim under section 2, the complaint alleged the following facts relevant to the "results" test:[2] a long history of offi-

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[1] Petitioners have not sought review in this Court of the holding of the Court of Appeals that respondents have stated a claim under the Fourteenth and Fifteenth Amendments. Chisom v. Edwards, 839 F.2d 1056, 1064-65 (5th Cir. 1988) (App. to Pet. for Cert. 24-25). See this Court's Rule 21.1(a).

[2] The contours of the "results" test are contained in the Senate Report that accompanied the 1982 amendments. S. Rep. No. 97-417 (1982) [hereafter "Senate Report"]. This Court has termed the Senate Report an "authoritative source" for interpreting the results test. Thornburg v. Gingles, 478 U.S. 30, 43 n. 7 (1986).

cial racial discrimination within the First Supreme Court District; widespread racially polarized voting within the First Supreme Court District; the socio-economically depressed status of black residents of the First Supreme Court District; the low percentage of black elected officials within the First Supreme Court District, including the absence of any black justices on the Louisiana Supreme Court; and the lack of any state policy justifying the use of a multimember district in the Orleans Parish area when all other Supreme Court Justices were elected from single-member districts.[3] In addition, respondents

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[3] The Senate Report contains a list of nine "[t]ypical factors" that may establish a violation of the results test. Senate Report at 28-29. The Report expressly states that "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." Id. at 29. In their amended complaint, respon-

alleged that it would be possible to create a single-member district consisting of Orleans Parish that would be majority-black both in total population and in number of registered voters. See Thornburg v. Gingles, 478 U.S. 30, 50 (1978).[4]

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dents made allegations concerning the first, second, third, fifth, seventh, and ninth factors.

[4] Under this Court's decision in Wells v. Edwards, 409 U.S. 1095 (1973), summarily aff'g 347 F. Supp. 453 (M.D. La. 1972), the principle of one-person, one-vote does not apply to the districts used to elect members of the Louisiana Supreme Court. The 1980 population of the First Supreme Court District is 1,102,253; the population of the largest single-member district is approximately 861,000, while the population of the smallest is approximately 411,000. See App. to Pet. for Cert. 47.

Respondents' complaint alleged that it would be possible to divide the present First Supreme Court District into an overwhelmingly white district consisting of the three suburban parishes having a total population of 544,738, and a majority-black district consisting of Orleans Parish having a population of 557,515. The Orleans Parish-based district would thus contain 50.58 percent of the popula-

In an opinion and order dated May 1, 1987, and subsequently amended on July 10, 1987, the United States District Court for the Eastern District of Louisiana (Charles Schwartz, Jr., J.) granted petitioners' motion to dismiss respondents' section 2 claims on the ground that section 2 does not cover judicial elections. Chisom v. Edwards, 659 F. Supp. 183 (E.D. La. 1987) (App. to Pet. for Cert. 28).

On February 29, 1988, a unanimous panel of the Court of Appeals for the Fifth Circuit (John R. Brown, Sam D. Johnson, and Patrick E. Higginbotham, JJ.) reversed the judgment of the district court and held that section 2 applies to judicial elections. Chisom v. Edwards, 831 F.2d 1056 (5th Cir. 1988)

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tion of the current First Supreme Court District.

(App. to Pet. for Cert. 4). A subsequent petition for rehearing and suggestion for rehearing en banc was unanimously denied.

Summary of Reasons for Denying the Writ

The question whether section 2 of the Voting Rights Act applies to judicial elections does not warrant this Court's review. This Court has unanimously held that a complementary provision of the Act covers judicial elections. Martin v. Haith, 477 U.S. 901 (1986). The decision of the Court of Appeals in this case is consistent with this Court's holding in Martin; with the holding of the only other court of appeals to address the question whether section 2 covers judicial elections, Mallory v. Eyrich, 839 F.2d 275 (6th Cir. 1987); with the language and legislative history of the Voting Rights Act; and with the Attorney

General's interpretation of the Act, to which this Court has consistently given great deference, see, e.g., United States v. Board of Commissioners, 435 U.S. 110, 131 (1978).

Reasons for Denying the Writ

I.

THIS COURT HAS ALREADY HELD THAT THE VOTING RIGHTS ACT COVERS JUDICIAL ELECTIONS

Petitioners refer to a number of cases involving challenges under the Voting Rights Act to judicial elections. Pet. for Cert. 6-9. They fail, however, to mention the most significant decision: this Court's summary, unanimous holding, in Martin v. Haith, 477 U.S. 901 (1986), that a complementary provision of the Voting Rights Act--section 5, 42 U.S.C. §

1973c--covers judicial elections.[5]

Section 5, which requires certain jurisdictions (including Louisiana) to obtain federal approval prior to implementing any changes in their method of electing public officials, and section 2, which contains a nationwide ban on the use of election practices which result in the dilution of minority voting strength, were intended to be interpreted in tandem. The House Report accompanying the 1982 amendment of section 2 and extension of section 5 expressly stated:

> Under the Voting Rights Act, whether a discriminatory practice or procedure is of recent

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[5] That holding effectively answers petitioners' ostensibly rhetorical question, "If a state, such as Louisiana, chooses to change its judicial selection process from an electoral system to one of appointment and/or merit, must it preclear such a change when most of the other forty-two states that elect judges need not preclear such a change?" Pet. for Cert. 5. Martin's precise holding is that the answer to that question is "Yes."

> origin affects on the mechanism that triggers relief, i.e., litigation [under section 2] or preclearance [under section 5]. The lawfulness of such a practice should not vary depending on when it was adopted, i.e., whether it is a change.

H.R. Rep. No. 97-227, p. 28 (1982) [hereafter "House Report"] (emphasis added); see also Senate Report at 5-6.

If the lawfulness of an electoral practice does not vary depending on its date of adoption, then this Court's holding in Martin--that the adoption of a particular system for electing judges may be forbidden when that system has either the purpose or the effect of diluting black voting strength--necessarily requires that the continued use of a particular system for electing judges must also be subject to scrutiny under section 2. Under Martin, it is clear beyond dispute that if Louisiana now used a different system for electing judges, it

could be forbidden from creating a multi-member district containing Orleans Parish and three suburban, majority-white parishes if that plan had the effect of diluting black voting strength.[6] The import of petitioners' argument therefore is that Louisiana's longstanding use of such a system should somehow be immune from attack under the Voting Rights Act. The Court of Appeals properly held that such a result would be "totally inconsistent with the broad remedial purpose of the Act," 839 F.2d at 1064 (App. to Pet.

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[6] Under section 5, a state cannot implement a change in its methods of electing public officials if the change would have either the purpose or the effect of diluting minority voting strength. 42 U.S.C. § 1973c. In section 5 cases, the burden of proof lies on the submitting jurisdiction, whereas in section 2 cases, the plaintiffs bear the burden of proof. Thus, it is entirely possible in close cases that a state will be denied preclearance of a change which, if it had been the existing practice, private plaintiffs would be unable to attack successfully.

for Cert. 23), which was to "create a set of mechanisms for dealing with continued voting discrimination, not step by step, but comprehensively and finally," Senate Report at 5.

II.

BOTH COURTS OF APPEALS THAT HAVE CONSIDERED THE QUESTION HAVE CONCLUDED THAT SECTION 2 APPLIES TO JUDICIAL ELECTIONS

Petitioners seek to show the importance of this Court's granting certiorari by pointing out that states within eleven of the Circuits elect judges. Pet. for Cert. 10-11. That fact, however, provides no basis for granting certiorari here, in light of the now unanimous consensus among the lower courts that section 2 applies to judicial elections. See Chisom v. Edwards, 839 F.2d 1056 (5th Cir. 1988); Mallory v. Eyrich, 839 F.2d 275 (6th Cir. 1987); Clark v. Edwards,

No. 86-435-A (M.D. La. Aug. 15, 1988); Williams v. State Board of Elections, No. 88C-2377 (N.D. Ill. Aug. 4, 1988); Martin v. Allain, 658 F. Supp. 1183 (S.D. Miss. 1987); see also Kirksey v. Allain, 635 F. Supp. 347 (S.D. Miss. 1986) (three-judge court) (section 5 applies to judicial elections); Haith v. Martin, 618 F. Supp. 410 (E.D.N.C. 1985) (three-judge court) (same), aff'd, 477 U.S. 901 (1986). In fact, the only two lower court judges to suggest that section 2 does not apply were both unanimously reversed by their respective courts of appeals in Chisom and Mallory. Thus, there is no conflict or confusion among the circuits.

III.

THE LANGUAGE, LEGISLATIVE HISTORY, AND EXECUTIVE CONSTRUCTION OF THE VOTING RIGHTS ACT SHOW THAT IT WAS INTENDED TO COVER JUDICIAL ELECTIONS

A. The Language of the Act

By its terms, section 2 covers all elections. Section 2(a) contains an absolute prohibition on racial discrimination in voting:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State . . . in a manner which results in a denial or an abridgement of the right of any citizen of the United States to vote on account of race or color . . . .

42 U.S.C. § 1973(a) (emphasis added). Section 14(c)(1) of the Act, which defines "voting" for purposes of the Act, convincingly shows that Congress intended for section 2 to reach all elections:

> The terms "vote" or "voting"

> shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, . . . having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which voters are received in an election.

42 U.S.C. § 1973l(c)(1) (emphasis added). Thus, neither the substantive nor the definitional sections of the Act provides any exclusion from the Act's coverage for particular types of elections. Aspirants for elective judicial positions are undeniably "candidates for public . . . office" and the procedures by which they attain those offices are undeniably "elections." Thus, section 2 by its terms outlaws schemes for electing judges that result in the denial or abridgment of equal voting strength for black citizens.

B. The Legislative History

This Court has frequently noted Congress' "intention to give the Act its broadest possible scope." Allen v. State Board of Elections, 393 U.S. 544, 566-57 (1969). The Act originated as H.R. 6400, a bill drafted by the Johnson Administration. This Court has recognized, "in light of the extensive role" that Attorney General Nicholas Katzenbach "played in drafting the statute and explaining its operation to Congress," that great weight should be afforded his testimony. United States v. Board of Commissioners, 435 U.S. at 131 & n. 20. Attorney General Katzenbach made clear, in response to questions from committee members, that "[e]very election in which registered electors are permitted to vote would be covered" by the Act. Voting Rights:

Hearings Before Subcommittee No. 5 of the House Judiciary Comm. on H.R. 6400 and Other Proposals To Enforce the Fifteenth Amendment to the Constitution of the United States, 89th Cong., 1st Sess. 21 (1965). See also id. at 67, 121 (discussing how Act will reach all elections). As the three-judge court whose opinion this Court summarily affirmed in Martin explained, "the Act applies to all voting without any limitation as to who, or what, is the object of the vote." Haith v. Martin, 618 F. Supp. at 413 (emphasis in original).

Moreover, as this Court explained in City of Mobile v. Bolden, 444 U.S. 55, 61 (1980) (plurality opinion), section 2 as enacted in 1965 "simply restated the prohibitions already contained in the Fifteenth Amendment . . . ." It defies belief to suggest that the Fifteenth

Amendment does not cover judicial elections:[7] if that were so, then States would be free explicitly to restrict the franchise in judicial elections solely to white voters, and that cannot be the law. Thus, at its enactment, section 2 must also have covered judicial elections.[8]

C. **The 1982 Amendments**

In 1982, Congress amended section 2 to overturn the plurality holding in Bolden that section 2 required a showing of discriminatory purpose. Thornburg v. Gingles, 478 U.S. at 35; Senate Report at

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[7] Indeed, petitioners do not press that point here. See supra note 1.

[8] Indeed, a major impetus for the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965 was the inability or unwillingness of elected state court judges in the South to protect the constitutional rights of black citizens. For an illuminating account of the treatment of black citizens by the elected state judiciary during the period immediately preceding the passage of the two Acts, see generally Southern Justice (L. Friedman ed. 1965).

2. Petitioners' entire argument ultimately boils down to a claim that, by using the phrase "representatives of their choice" in explicating the results test, Congress intended to exclude judicial elections from section 2.

The legislative history simply does not support petitioners' claim. To the contrary, both supporters and opponents of amended section 2 assumed it covered judicial elections. Thus, the Senate and House Reports used the words "representatives," "candidate," and "elected official" interchangeably, see, e.g., Senate Report at 16, 28, 29, 30, 31 & 67; House Report at 4, 18, and relied, in discussing progress under the Act, on figures regarding the number of black elected officials that explicitly included elected judges, see, e.g., House Report at 7-9; see also S. Rep. No. 94-295, p. 14

(1975).[9] Cf. Senate Report at 151 (minority views of Sen. Hatch) (section 2 reaches "all governmental units, including . . . judicial districts . . . as well as state legislatures"). In light of these references and Congress' clear purpose--to expand the protection afforded black voters by section 2--it makes no sense to assume that Congress sub silentio removed judicial elections from scrutiny under section 2.

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[9] The U.S. Commission on Civil Rights and the Bureau of the Census have similarly included minority jurists within their descriptions of minority elected officials. See, e.g., U.S. Commission on Civil Rights, The Voting Rights Act: Ten Years After 377 (1975); U.S. Commission on Civil Rights, The Voting Rights Act: Unfulfilled Goals 27-28 (1981) (blacks were rarely elected to "law enforcement positions (including sheriffs and judges") (emphasis added); U.S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of the United States 1986, at 252 (106th ed. 1985).

D. The Executive Construction of Section 2

As petitioners note, the Attorney General has certified this to be a case of general public importance. Pet. for Cert. 5. What petitioners fail to mention is that he did so in the context of a motion by the United States to intervene as a plaintiff in this lawsuit. See 42 U.S.C. § 2000h-2 (conferring right of intervention on Attorney General when he certifies that an action seeking relief under the Fourteenth Amendment is of general public importance).[10] Paragraph 13 of the United States' complaint in intervention alleges, as did respondents' complaint, that the current method of electing the two justices from the First Supreme Court District violates the

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[10] The Solicitor General has also filed a Brief in Opposition to this petition for certiorari.

results test of section 2. Thus, the Attorney General, to whose construction of the Act this Court has traditionally paid substantial deference, see, e.g., United States v. Board of Commissioners, 435 U.S. at 131, has consistently taken the position that section 2 covers all elections and has expressly interpreted section 2 to cover judicial elections.

IV.

THE DISTINCTIVE NATURE OF JUDICIAL OFFICES DOES NOT CREATE A CERTWORTHY ISSUE

The bulk of petitioners' argument revolves around the special functions performed by judicial officers to explain why such officials should not be viewed as representatives. That argument, however, misses the point. Louisiana has decided to fill its bench by allowing the State's voters to choose judges through popular elections. Thus, while judges

may serve the public in a very different way than city council members, or state legislators,[11] the fact remains that Louisiana has concluded that judges are not so different from other public officials that elections are an inappropriate selection device. Having allowed all qualified voters to participate directly in the judicial selection process, the State cannot use a process that values the votes of white citizens and black citizens differently, by diluting the opportunity of black citizens to elect their preferred candidates.

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[11] In any event, state nomenclature cannot be allowed to dictate the scope of section 2's coverage. For example, under Arkansas law, the chief executive official of a county is the "county judge," Ark. Code. Ann. § 14-14-502(a)(2)(A)(i), and in Massachusetts, the official name of the state legislature is the "General Court," Mass. Const. Pt. 2, Ch. I, § I, Art. I.

V.

IN ANY EVENT, THE ESSENTIALLY INTERLOCUTORY NATURE OF THIS CASE MAKES IT INAPPROPRIATE TO GRANT CERTIORARI

The Court of Appeals did not decide that Louisiana's present scheme for electing Supreme Court Justices from the First Supreme Court District violates either the Constitution or section 2. Nor did it decide that Louisiana must adopt single-member districts. All it decided was that respondents had stated a claim, which they should be given the opportunity to prove at trial.[12] Moreover, because petitioners have not sought certiorari on the question whether the Constitution covers claims of racial vote dilution in judicial elections, this case will have to be tried regardless of

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[12] Judge Schwartz has set the trial in this case for December 14, 1988.

whether this Court grants certiorari and reverses on the question presented.

Conclusion

For the reasons stated, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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No. 88-327

In The
Supreme Court of the United States
October Term, 1988

—o—

BUDDY ROEMER, in his capacity as Governor of the State of Louisiana; FOX McKEITHEN, in his capacity as Secretary of the State of Louisiana; and JERRY M. FOWLER, in his capacity as Commissioner of Elections of the State of Louisiana,

Petitioners,

vs.

RONALD CHISOM, MARIE BOOKMAN, WALTER WILLARD, MARK MORIAL, LOUISIANA VOTER REGISTRATION/EDUCATION CRUSADE, and HENRY A. DILLON, III,

Respondents.

—o—

PETITIONERS' REPLY BRIEF

—o—

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PETITIONERS' REPLY BRIEF

I. The National Importance Of The Question Presented Justifies The Court's Immediate Consideration.

The fact that 42 states are affected by the Fifth Circuit's holding in the *Chisom* case justifies the Court's immediate consideration as to the applicability of Section 2(b) of the Voting Rights Act to state electoral judicial selection systems.

The respondents argue that consideration of this case by the Court at this time is premature and should await a trial on the merits. Louisiana contends that such a delay would be to shut the barn door after the horse has run away—not only in Louisiana but in the seven other states in which parallel suits have been brought, and, potentially, in all of the forty-two states where judges are elected. Phrased differently, this Court will be deprived of a meaningful opportunity to review the merits because a remedy will already be in place.

Relying upon the decision by the United States Court of Appeals for the Fifth Circuit in this case that Section 2 of the Voting Rights Act applies to judges, the district court in *Clark v. Edwards* has ordered the State of Louisiana to rewrite completely its system of electing trial, family court, and appellate judges by January 31st, 1989. If Louisiana fails to meet this deadline or if its plan is not accepted by the trial judge, he will himself fashion a new system. Pursuant to that court order, the Governor of Louisiana has appointed a commission for revision of the judiciary selection process and has stated that a special session of the legislature will be called in January to consider this question. If this Court does not agree to hear

the *Chisom* case, Louisiana faces the real possibility (indeed probability) that a new system will be adopted and put in place long before this Court holds whether any restructuring was actually necessary.

Arguing against immediate review in an *amicus* brief, the Solicitor General downplays the importance of this case, stating that there "have been very few complaints under Section 2 against judicial electoral systems." Brief at 5. In stark contrast to this position, the United States Attorney General has certified this case to be of general public importance. Actually, more than "very few complaints" are involved—indeed, eight states already face such challenges. In the Illinois suit, 201 state judges have been joined as parties.

If the question is of little significance, why have eight states filed *amici* briefs urging review by this Court? Why, also, did the United States file an *amicus* brief in the Fifth Circuit *after* the District Court had held for the State of Louisiana, and assert in brief page 1 "[s]ince this is the first court of appeals to address the issue, the United States has considerable interest in the case's outcome"? Why did the United States intervene in this case *after* the Fifth Circuit had vacated the injunction as imposed by the District Court? All of this activity on the part of the United States, including the filing of an *amicus* brief with this Court, underscores the importance of the issue posed in the petition for certiorari. Since the petition was filed, another suit has been filed in Louisiana, as anticipated in the petition for certiorari [page 9]. This third suit involves all of the judges in the State of Louisiana not covered by either the *Chisom* or *Clark* case, the Juvenile, Mu-

nicipal/City, Parish and Traffic Court judges. *Arnold et al. v. Roemer, et al.*, No. 88-3983, United States District Court for the Eastern District of Louisiana. Also, since the petition for certiorari was filed, another suit was filed on September 21st, 1988. *Marzuq A. Al-Hakim, et al. v. State of Florida*, 88-1416-CIV-T-10 "A", U.S.D.C. M.D. Fla, Tampa Division.

Guidance by this Court at this time is necessary to prevent uncertainty from plaguing states which elect judges. Such confusion is illustrated by the "on again, off again" status of the 1988 Louisiana Supreme Court election in the district involved in this case. On May 9th, 1988, the plaintiffs first moved to stop the October 1st, 1988 judicial election, filing a motion for injunction in the Fifth Circuit. After this was denied by that Court, the plaintiffs immediately sought an injunction by the district court. On July 7th, 1988, the injunction was granted and the election was enjoined. On July 26th, 1988, the injunction was partially lifted by the Fifth Circuit to allow qualifying, although no statement was made as to whether the election would ultimately be allowed. On August 3rd, 1988, the Fifth Circuit lifted the entire injunction after hearing arguments by the State, the plaintiffs, the incumbent Justice seeking reelection, his 1988 opponent, and the incumbent in the seat to be filled by election in 1990. The Court did impose an unprecedented "second chance" qualifying period. Only after an application for rehearing *en banc* was denied on September 14th, 1988, (two and one half weeks before the scheduled election) could the public know that there would in fact be a 1988 election.

Similar uncertainty has pervaded the elections for state trial and appellate judges in Louisiana in 1988. The

— plaintiffs in *Clark v. Edwards* sought to enjoin all judicial races scheduled for the October 1st, 1988 election. The district court granted an injunction in three opinions dated August 10th, 11th, and 15th, 1988. The district court then modified its order to allow qualifying. Despite the Fifth Circuit's ruling allowing the Louisiana Supreme Court election in *Chisom*, the *Clark* district court continued to enjoin the election. The Fifth Circuit reversed this injunction on September 7th, 1988. Only after an application for a stay [A-198] was denied by Justice Byron White on September 12, 1988, and by this entire Court on September 27th, 1988, (the latter only four days before the election) did the Louisiana public know that there would be 1988 elections.

Clearly, then, a decision by this Court at this time is vitally necessary to reduce uncertainty and confusion among the judiciary and populace of the forty-two states who have chosen to elect their judges. Indeed, the Solicitor General has virtually admitted the necessity of such guidance in an *amicus* brief, stating that the differing function of judges may influence whether a Section 2 violation has occurred and what the appropriate remedy will be. Brief at 10 n.8. If the Solicitor General is stating that the *Gingles* factors are or could be inappropriate, that issue should be resolved now before Louisiana and as many as 41 other states have scrapped their current system of electing judges.

II. Reliance On The Attorney General's Interpretation Of The Voting Rights Act Is Misplaced.

The respondents in brief, 22-23, suggest the infallibility of the Attorney General's interpretation of the Voting

Rights Act. The Attorney General's views of this statute, however, have been inconsistent. In *Thornburg v. Gingles*, 478 U.S. 30 (1986) the Solicitor General sided with the Attorney General of North Carolina and sought reversal of the district court's interpretation of Section 2 of the Voting Rights Act. In *Gingles, id* at 43, fn. 7, this Court stated:

> The United States urges this Court to give little weight to the Senate Report, arguing that it represents a compromise among conflicting "factions," and thus is somehow less authoritative than most Committee Reports. Brief for United States as *Amicus Curiae* 8, n.12, 24, n.49.

Now this same Solicitor General sides with the respondents in this matter concerning an interpretation of Section 2(b) of the Voting Rights Act and is now prepared to embrace the same legislative history that he renounced in the *Gingles* case. Brief of the United States as *Amicus Curiae*, 9-10. In fn. 7, 10, Senator Hatch's oft-quoted observation concerning "judicial districts" is mentioned. What has never been mentioned by any of the quoters of this language, including the Fifth Circuit in *Chisom*, is the fact that a judicial district is considered a geographic area by some states and both executive and legislative officers are elected from such districts. For instance, in Mississippi, the Highway Board and Public Service Commission are elected from Mississippi's Supreme Court Districts. §§ 9-1-1, 65-1-3, and 77-1-1, Mississippi Code of 1972 Annotated.

III. The Martin Decision Does Not Foreclose The Question Of The Applicability Of Section 2 Of The Voting Rights Act To A State Judicial Selection Process.

The respondents note that in *Martin v. Haith*, 477 U.S. 901 (1986), this Court summarily affirmed a district court decision that Section 5 of the Voting Rights Act applies to the state judiciaries. That section, however, does not use the crucial limiting term "representatives," a term with a plain meaning long construed by this Court Indeed, this Court has recognized a distinction between the judiciary and other branches of the government in summarily affirming a decision that the "one man, one vote" principle does not apply to the judiciary. *Holshouser v. Scott*, 409 U.S. 807 (1972). The district court decision in *Holshouser* noted the difference between election of the judiciary and "election of the representatives of the people—officials who make laws, levy and collect taxes, and generally manage and govern people." *Holshouser v. Scott*, 335 F. Supp. 928, 930 (M.D.N.C. 1971). Judges, on the other hand, "do not govern nor represent people nor espouse the cause of a particular constituency." *Id.* at 932; *accord, New York State Association of Trial Lawyers v. Rockefeller*, 267 F. Supp. 148 (S.D.N.Y. 1967); *Buchanan v. Rhodes*, 249 F. Supp. 860 (N.D. Ohio), *appeal dismissed*, 385 U.S. 3 (1966).

In reality, neither the summary affirmance in *Martin* nor in *Holshouser* govern the issue presented in this case. Even if either constituted an instructive precedent, such a summary affirmance is "not of the same precedential value as would be an opinion of the Court treating the question on the merits." *Edelman v. Jordan*, 415 U.S. 651, 671 (1974); *accord, Tully v. Griffin*, 429 U.S. 68, 74-75

(1976); *Richardson v. Ramirez*, 418 U.S. 24, 83 n. 27 (1974) (Marshall, Douglas, & Brennan, J., dissenting).

IV. The Experience Of The Courts With Section 5 Would Not Be Relevant In Determining Interpretation Of Section 2.

Section 2 of the Voting Rights Act, as amended, created a "results" test while the unamended Section 5 of the Voting Rights Act has always applied an "effects" test. The two sections serve entirely different purposes. Section 5 has a limited applicability—only to specific targeted states where voting statutory changes may not occur without Justice Department approval [preclearance]. Section 2, however, applies to the voting statutes of all states as written and applied before and after the 1982 amendment. A Section 2 violation must be established through a full judicial evidentiary hearing, in which the plaintiff carries the burden of proof. A Section 5 determination is made initially administratively, mostly through correspondence. If the Section 5 change is found objectionable, then the finding is subject to judicial review in the United States District Court for the District of Columbia, with the state bearing the burden of proof.

In commenting on the comparison of the "results" test [Section 5] with the "effects" test [Section 2], the Senate Report on the Voting Rights Act, S. Rep. No. 1992, 97th Cong., 2d Sess. (1982) stated:

> "The confusion introduced by the results test is illustrated somewhat by the near-total disagreement as far as one of the most basic questions involved in the analysis: Does the 'results' test proposed in section 2 mean the same thing as the 'effects' test in section 5? Despite the fundamental importance of this mat-

> ter, there has been disagreement among witness after witness on this."

Id. at 31.

> "During the course of both the House and Senate hearings on the Voting Rights Act, approximately half of the witnesses who discussed this issue claimed that the results test in section 2 was similar or identical to the effects test in section 5, and hence that the judicial history of interpretation under section 5 was relevant; the other half argued that it meant something substantially or totally dissimilar."

Id. at 32.

Interestingly, Julius L. Chambers, one of the counsel for the respondents herein testified concerning the difference between Section 2 and Section 5:

> Question: What is the relationship between the results test in section 2 and the effects test in section 5?
>
> Chambers: They are not the same test . . .
>
> Question: In other words, the experience of the courts with section 5 would not be relevant in determining how section 2 is likely to be interpreted?
>
> Chambers: That is correct.

Id. at 31-32.

Similarly, Professor Archibald Cox observed:

> If you mean the effects test as interpreted by the courts with regard to section 5, I think that is considerably different from the results test in section 2.

Id. at 32.

Forewarned by these differing opinions from congressional witnesses as to the applicability of the Section 2 "results" test, the Fifth Circuit should have turned to

the plain meaning of the word "representatives" as used in the Statute. Section 5 does not use the term "representatives." Indeed the term "representatives" appears nowhere in the Voting Rights Act except in Section 2(b). If Congress had intended "representatives" to mean "elective officials" (which would have included judges) it could easily have said so. Using the term "representatives" demonstrates Congress meant something other than all elected officials. By enlarging the meaning of the word "representatives" to include state court judges, the Fifth Circuit was not interpreting the words of the Statute, but rather was amending the language to make the Statute say something else. Congress made no attempt to define the word "representatives." "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning. [Citations omitted]" *Perrin v. United States,* 444 U.S. 37, at 42 (1979). As this Court has counseled, "we are not at liberty to construe language so plain as to need no construction, [fn. citations omitted] or to refer to committee reports where there can be no doubt of the meaning of the words used [fn. citations omitted]. *Helvering v. City Bank Farmers Trust Co.*, 296 U.S. 85, at 89 (1925).

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CONCLUSION

The question presented for the Court's consideration impacts forty-two states. It would be difficult to envision a question of greater importance to these affected states than the continued viability of their judicial systems. The resolution of the question presented needs to occur now.

All of the above and foregoing is thus respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

BUDDY ROEMER, GOVERNOR OF THE STATE OF LOUISIANA, ET AL., PETITIONERS

v.

RONALD CHISOM, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973, applies to the election of state court judges.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-327

BUDDY ROEMER, GOVERNOR OF THE STATE OF LOUISIANA, ET AL., PETITIONERS

v.

RONALD CHISOM, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case presents the question whether judicial elections are covered by Section 2 of the Voting Rights Act of 1965, as amended (42 U.S.C. 1973). The United States has primary responsibility for the enforcement of Section 2, which is an important federal statute that prohibits a wide range of racially discriminatory voting or election practices. Any decision in this case will directly affect the government's enforcement responsibilities.

The United States participated in the court of appeals as amicus curiae. In addition, after the court of appeals issued its decision in this case and remanded the case to the district court for trial, the United States intervened in the litigation pursuant to 42 U.S.C. 2000h-2 and is now party plaintiff.

STATEMENT

1. The state of Louisiana provides for the election of the seven justices of the Supreme Court of Louisiana from six judicial districts (Pet. App. 7). The First District, which includes Orleans, St. Bernard, Plaquemines, and Jefferson Parishes, elects two justices at-large (*ibid.*). Each of the other five districts elects one justice. The population of the First District is sixty-three percent white, and sixty-eight percent of registered voters are white (*ibid.*).

On September 19, 1986, respondents, who are black registered voters in Orleans Parish, Louisiana, filed a complaint alleging that the at-large system for electing two state supreme court justices from the First Judicial District diluted black voting strength, in violation of Section 2 of the Voting Rights Act of 1965 (Act), as amended (42 U.S.C. 1973), and the Equal Protection Clause (Pet. App. 6). Respondents alleged that the elections in the First District had been marked by racial bloc voting, that past official discrimination had continuing effects on respondents, that few blacks had been elected to public offices in the district, and that no blacks had been elected to the Louisiana Supreme Court from the First District (*id.* at 8). Respondents also alleged that there was no justifiable basis for singling out the First District for at-large elections (*ibid.*). As relief, respondents sought the division of the First District into two districts, each of which would elect one justice. Such a division would produce one district, consisting of Orleans Parish, with a fifty-five percent black population and a fifty-two percent black registered voter population, and a second district, consisting of the remaining parishes of the First District, with a substantial majority of white voters (*id.* at 7).

2. The district court dismissed the complaint, holding that it failed to state a violation of Section 2 of the Voting

Rights Act (Pet. App. 28-43). The court found that Section 2, by its terms, is violated only when minority voters show that they do not have an equal opportunity "to elect representatives of their choice." Section 2, the court concluded, does not cover judicial elections because judges are not "representatives" (Pet. App. 35-39). The court also relied on the fact that constitutional "one man, one vote" standards do not apply to judicial elections (*id.* at 35), and that the legislative history of Section 2 does not specifically refer to judicial elections (Pet. App. 36-37).

3. A unanimous panel of the court of appeals reversed the district court's judgment and remanded the case for trial (Pet. App. 1-26).

The court noted, first, that the plain language of the Voting Rights Act encompasses judicial elections. The court began by observing that Act seeks to eradicate racially discriminatory electoral practices, and therefore should be broadly construed (Pet. App. 10-12). The original language of Section 2 of the Act (42 U.S.C. (1970 ed.) 1973) prohibited discrimination in any "voting qualification or prerequisite to voting, or standard, practice, or procedure" (Pet. App. 10). Section 14(c)(1) of the Act (42 U.S.C. 1973*l*(c)(1)), defined "voting" as applying to "any primary, special, or general election" and included all action necessary to have votes counted for "candidates for public * * * office" (Pet. App. 13). Because elected judges are such "candidates," the court concluded that the "express terms" of Section 2 cover judicial elections (Pet. App. 12). The court distinguished the "one person, one vote" cases that have excluded judicial elections—on which the district court relied—by pointing out that a claim of dilution of minority voting strength is based on racial discrimination and implicates different statutory and constitutional considerations (*id.* at 14-15).

The court next examined the legislative history to the 1982 amendments to Section 2. The court found that the history of the amendments demonstrates that Congress intended to expand, not to limit, the protection of the Act (Pet. App. 17-21). Congress amended the language of the Act to incorporate in Section 2 the "results" test rejected by a plurality of this Court in *Mobile* v. *Bolden*, 446 U.S. 55 (1980) (Pet. App. 16-21). Under the results test, a violation could be shown without proof that the challenged practice had been intentionally designed or maintained to limit minority voting rights. The language Congress added in 1982 regarding the standard of proof of a violation, including the word "representatives" on which the district court focused, should not be read to *limit* the existing broadly defined coverage of the Act (*id.* at 12, 17-18). The court added that the legislative history indicated that Congress understood Section 2 to cover judicial elections, and that the House and Senate hearings on the Voting Rights Act contained repeated references to judicial elections (Pet. App. 19-20).

Although the case arose under Section 2, the court also looked to judicial construction of Section 5 of the Voting Rights Act of 1965, (42 U.S.C. 1973c). Section 5, which requires preclearance of changes in electoral procedures in some states, has been construed to encompass judicial elections (Pet. 21-22 (citing *Haith* v. *Martin*, 618 F. Supp. 410 (E.D.N.C. 1985), aff'd, 477 U.S. 901 (1986)). The court pointed out that the language defining the scope of Section 5 is virtually identical to that of Section 2 and that "statutory construction, consistency, and practicality point inexorably to the conclusion that if section 5 applies to the judiciary, section 2 must also apply to the judiciary" (Pet. App. 23). Finally, the court found additional confirmation of its interpretation of Section 5 in the Attorney

General's consistent construction of the Voting Rights Act, and in his view that it covers judicial elections (Pet. App. 23-24).[1]

DISCUSSION

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review of this interlocutory decision is not warranted.

1. This case is not yet ripe for review by this Court. The court of appeals, after holding that judicial elections are covered by Section 2, remanded the case for trial. Petitioners are in exactly the same position as they would have occupied if the district court had denied the motion to dismiss. Petitioners offer no reason why this Court should depart from its usual course of declining to grant interlocutory review. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

Petitioners assert that this case presents an important question, appropriate for immediate review, because many states elect judges, and that if those elections are subjected to Section 2 coverage, "chaos will ensue" (Pet. 11). As petitioners note, however, there have been very few complaints under Section 2 against judicial electoral systems (see Pet. App. 6-7). Moreover, the lower courts in this case have demonstrated the ability to respond to petitioners' assertions of undue disruption to the state judicial

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[1] The court also held that the district court erred in holding that the complaint did not sufficiently allege a violation of plaintiffs' constitutional rights (Pet. App. 24-25). Further review of that issue is not sought in the present petition.

system from this litigation.[2] If the district court enters a final judgment that the electoral scheme in place in Louisiana violates Section 2, and if such a judgment is affirmed on appeal, petitioners may file a petition for a writ of certiorari at that time.

2. There is no conflict among the courts of appeals on the issue petitioners present. The only two courts of appeals to decide this issue agree that Section 2 applies to judicial elections. The Sixth Circuit, in *Mallory* v. *Eyrich*, 839 F.2d 275 (1988), held that Section 2 applied to judicial elections, and applied a very similar analysis to that adopted by the court of appeals in this case.

3. The court of appeals' decision in this case correctly construes Section 2. There is no support for the view that Congress, when it amended the Voting Rights Act in 1982, created an exception for judicial elections.

a. The plain language of the Act, as it was originally passed in 1965, covered all electoral proceedings, without exception. Section 2 provided (42 U.S.C. (1970 ed.) 1973):

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

Section 14 of the Act defined the term "vote" to cover all elections: "[t]he terms 'vote' or 'voting' shall include all action necessary to make a vote effective in *any primary, special, or general election* * * * with respect to *candidates*

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[2] As petitioners acknowledge (Pet. 5 n.1), since the decision on which review is sought, the court of appeals has reversed a district court decision preliminarily enjoining a scheduled October election of a state supreme court justice from the First District. Clearly, the civil litigation rules and procedures have been adequate to protect fully the State's interests.

for public or party office * * * " (42 U.S.C. 1973*l*(c)(1) (emphasis added)).[3]

This Court has summarily affirmed a decision holding that judicial elections are covered by the preclearance requirements of Section 5 of the Act (*Haith* v. *Martin*, 618 F. Supp. 410 (E.D.N.C. 1985), aff'd, 477 U.S. 901 (1986)). The language defining the electoral practices covered by Section 5 is identical to that defining the coverage of Section 2, and basic tenets of statutory construction require that it be given the same interpretation. See, *e.g.*, *Pampagna Sugar Mills* v. *Trinidad*, 279 U.S. 211, 217-218 (1929).[4]

b. In 1982, Congress amended Section 2 (42 U.S.C. 1973) to read:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to

---

[3] This Court has consistently recognized that Congress intended, when passing the Voting Rights Act, to enact a broad prohibition on voting discrimination. The Voting Rights Act "reflects Congress' firm intention to rid the country of racial discrimination in voting." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 315 (1966); see also *United States* v. *Sheffield Bd. of Comm'rs*, 435 U.S. 110, 122-123 (1978); *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 565-566 (1969).

[4] The court of appeals was also correct to note that it would be quite anomalous if Section 5 applied to judicial elections, but Section 2 did not. See Pet. App. 22-23.

> nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Congress thus retained the original coverage language of Section 2(a), and added new language in Section 2(b) to provide guidance on what constitutes a violation of the Act. Petitioners focus on the word "representatives," which is part of Section 2(b), as establishing a congressional exception to Section 2 coverage for the election of judges (Pet. 12-16, 18-26). As the court of appeals concluded, however, Congress did not intend to exclude judicial elections from Section 2 coverage when it amended Section 2 to include that language.

Congress amended Section 2 in response to this Court's decision in *Mobile* v. *Bolden,* 446 U.S. 55 (1980), in which a plurality of the Court concluded that Section 2, as originally written, prohibited only intentional acts of racial discrimination in voting. The 1982 amendments added language explaining that proof of intent was not required to make out a violation of Section 2. See *Thornburg* v. *Gingles,* 478 U.S. 30, 44 n.8 (1986). Accordingly, the objective of Section 2(b) was not to identify the class of elected officials within the statute's reach, but to prescribe the "results" test.

Nor does the legislative history of the 1982 amendments support the argument that Congress used the term "representatives" to exclude judicial elections from the coverage of Section 2.[5] Congress was aware that in some states judges were elected. Witnesses in hearings on the legislation that became the 1982 amendments referred repeatedly to the fact that judges were elected in many states.[6] There is no statement by any member of Congress that inclusion of the word "representatives" in the 1982

---

[5] The legislative history of the 1982 amendments shows that the term "representatives" was not used as a narrowing term of art. The language of subsection (b)—"to participate in the political process and to elect representatives of their choice"—is derived from *White* v. *Regester*, 412 U.S. 755, 766 (1973), which used the term "legislators." See S. Rep. 97-417, 97th Cong., 2d Sess. 27 (1982). Members of Congress used the term "representatives" interchangeably with the term "candidates" when discussing the revised Section 2. See S. Rep. 97-417, *supra*, at 16, 28, 30, 32, 67, 100; see also 128 Cong. Rec. 14132 (remarks of Sen. Dole), 14133 (remarks of Sen. Thurmond) (1982).

[6] See *e.g.*, *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 38, 193, 239, 280, 503, 574, 804, 937, 1182, 1188, 1515, 1528, 1535, 1745, 1839, 2647 (1981). Much of the same sort of evidence was presented at the Senate hearings. See *Voting Rights Act: Hearings on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 208-209, 669, 748, 788, 789 (1982). Congress had been made aware, when Section 2 was first enacted in 1965, and extended in 1970 and 1975, that some states elected their judges. See, *e.g.*, 111 Cong. Rec. 15722-15723 (1965); 115 Cong. Rec. 38493 (1969); H.R. Rep. 94-196, 94th Cong., 1st Sess. 7 (1975); 121 Cong. Rec. 16241 (1975). Moreover, because there can be a blurring or combining of judicial and nonjudicial duties in state offices, the exception to Section 2 urged by petitioners would be unmanageable.

amendments was intended to exclude judges, for the first time, from Section 2 coverage.[7]

In all events, the natural reading of the term "representatives" does not exclude elected judges in the context of the Voting Right Act. While elected judges do not represent voters in the same way that legislators do, when a state chooses to have an elected judiciary, it establishes a policy that judges will be selected by voters to express and represent the civil and legal views of the community. That is precisely the situation in which the Voting Rights Act seeks to ensure that no minority is denied an equal opportunity to participate in the political processes leading to election.[8]

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[7] In fact, Senator Hatch, who opposed the enactment of the "results" test, stated in separate comments made part of S. Rep. 97-417, *supra,* at 151, that the term " 'political subdivision' encompasses *all* governmental units, including * * * judicial districts * * *." No one disagreed. Cf. *United States* v. *Sheffield Bd. of Comm'rs,* 435 U.S. at 130.

[8] Subjecting elected judges to Section 2 coverage does not mean, of course, that Section 2 necessarily applies to judicial elections in precisely the same way as it applies to other elections. The differing function of judges from other elected officials may influence the factors to be considered in determining if a Section 2 violation has occurred, and what would be an appropriate remedy. These difficult issues are not presented in this case, since the court of appeals' decision dealt only with the question of whether Section 2 covers judicial elections at all. See U.S. Amicus Br. 19-21. Questions of how Section 2 should be applied will arise when there is a specific application of Section 2 to judicial elections (*e.g.,* on the remand in this case).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 88-327

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

BUDDY ROEMER, et al.,
Petitioners,

vs.

RONALD CHISOM, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICI CURIAE* FOR THE STATES OF TEXAS, ARKANSAS, FLORIDA, GEORGIA, ILLINOIS, AND NORTH CAROLINA IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

The Attorneys General of the *amici curiae* States of Texas, Arkansas, Florida, Georgia, Illinois, and North Carolina, *see* Appendix, sponsor this brief, pursuant to Supreme Court Rule 36.4, to bring to the attention of the Court an issue of significant and potentially disruptive impact on state judiciaries.

In *Chisom v. Edwards*, 839 F.2d 1056, 1064 (5th Cir. 1988) ("*Chisom*"), the decision from which Louisiana petitions for a writ of certiorari, the Fifth Circuit held that section 2 of the Voting Rights Act "does apply to state judicial elections." The *Chisom* decision casts a cloud of uncertainty over the forty-two states that have either judicial elections or judicial retention election systems. *See* Louisiana's Petition For A Writ of Certiorari, at 10-11. Already, at least six section 2 suits have been filed challenging the judiciaries of Alabama, Georgia, Illinois, Mississippi, and Texas. The Illinois suit encompasses 201 state judges, Louisiana's Petition, at 8-9, and a Texas suit, 206 judges.

Only a definitive statement from this Court determining whether the *Chisom* principle is correct can remove the cloud of uncertainty and permit the states to order their affairs under clearly discernible governing legal principles. To remove all doubt, the Court should grant certiorari and decide whether the principle enunciated by the *Chisom* court is correct. If the Court does not act, however, premature remedies pursuant to *Chisom* could unnecessarily disrupt the forums where the majority of this Nation's lawsuits are tried: elected state trial courts.

Quick action also is necessary to maintain the delicate balance in this important area of state-federal relations. State governments, in our constitutional scheme, act as independent political communities with the authority to make important decisions of self-governance. *See, e.g., Lane County v. Oregon*, 7 Wall. 71, 76 (1869). Perhaps no incidents of state self-governance are more central to concerns of federalism than the preservation of the integrity

of state law and the protection of the institutional autonomy of state judiciaries. *See, e.g., Michigan v. Long*, 463 U.S. 1032 (1983); *Younger v. Harris*, 401 U.S. 37 (1971). As the Court has noted, "in a Union where both the States and the Federal Government are sovereign entities, there are basic concerns of federalism which counsel against interference by federal courts, through injunctions or otherwise, with legitimate state functions, **particularly with the operation of state courts.**" *Trainor v. Hernandez*, 431 U.S. 434, 441 (1977) (emphasis added).

Indeed, the recent Fifth Circuit decision in *Chisom v. Roemer*, 853 F.2d 1186, 1188-89 (5th Cir. 1988) ("*Chisom II*"), illustrates the urgent need for this Court's action and guidance. The Fifth Circuit in *Chisom II* vacated the district court's preliminary injunction enjoining the election of a justice of the Louisiana Supreme Court partly on the basis that "the Supreme Court has yet to speak on the critical issue whether section 2 of the Voting Rights Act applies to judicial elections[,]" and because it did not want to unnecessarily intrude upon an important area of state-federal relations such as a "state's judicial process."

The issue presented here could fundamentally alter state courts, a bedrock institution in our society of laws. A decision now by the Court clarifying the reach of section 2 is necessary to prevent undue interference with the operation of state courts and to provide guidance to federal courts struggling or soon to be struggling with *Chisom*-generated questions.

SUMMARY OF ARGUMENT

The *Chisom* holding that judicial elections are covered by section 2 of the Voting Rights Act sets in motion events that soon will cascade into an avalanche of litigation seeking to change the way state judiciaries are elected. The litigation will be complex and time-consuming. It could result in court-ordered reconfiguration of several states' judicial systems and implementation of the novel concept of electing judges from single member districts.

States need to know now from the Court whether their current judicial election systems are going to be measured by a results test in a vote dilution claim under the Voting Rights Act. Only then will the states be able to assess their election systems in the clear light of the law and determine with some degree of certainty the proper response to anticipated, threatened, or actual litigation. Some may choose to reconfigure without a lawsuit or trial, while others may choose to litigate the issue. All states, though, at least will know the ultimate evidentiary standards and what proof must be offered.

While there admittedly is no conflict in the circuits on the *Chisom* principle, the issue is too important and the state judiciary too critical an institution for the Court to await further judicial developments before settling the question. It is a straightforward issue of statutory construction, ultimately hinging on the meaning of a single word, "representatives."

The Fifth Circuit's analysis was too facile to definitively settle the question analytically, transgressing elementary principles of statutory construction in reaching its conclusion. The plain, commonly understood meaning of "representatives" cannot be said to include judges. If Congress had meant to take the major step of subjecting a major state institution to new federal standards (as the Fifth Circuit has now decided Congress did) surely there would have been at least a modicum of debate on the matter. There was none at all. Plain language aside, this Congressional silence suggests that the thunderous step really was not taken and, therefore, that the Fifth Circuit was wrong.

Before state judiciaries are subjected to major alterations, before attorney fees mount, and before lengthy trials begin, the states urge the Court to settle the controlling legal principle and tell them the basic standard by which they are to be judged.

ARGUMENT

I. The 1982 Amendment to the Voting Rights Act

Congress under the aegis of the Fifteenth Amendment enacted the Voting Rights Act of 1965 ("1965 Act"), to "banish the blight of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). The heart of the 1965 Act consisted of specific remedies to break down the most commonly erected barriers that perpetuated voting discrimination. *Id.* at 315-16 (discussing the impact of sections 3, 4, 5, 6, 7, 9, 12 and 13). Congress, tracking the Fifteenth Amendment, enacted a general precatory provision, section 2, which "broadly prohibit[ed] the use of voting rules to abridge exercise of the franchise on racial grounds." *Id.* at 316.[1]

In *City of Mobile v. Bolden*, 446 U.S. 55, 60-61, 65 (1980) (*"Bolden"*), the Court reasoned that section 2 of the 1965 Act "no more than elaborates upon . . . the Fifteenth Amendment, and the sparse legislative history of section 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself." It then held that section 2 prohibits only intentional acts of discrimination which deny or abridge the freedom to vote.

In response to *Bolden*, Congress amended section 2, dividing it into two subsections. In subsection (a), it added

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1 As originally enacted, section 2 of the 1965 Act provided that:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973(a) (1982)).

a "results" test to the original section 2 language,[2] and it added new language as subsection (b), which states in pertinent part:

> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect **representatives** of their choice.

42 U.S.C. § 1973(b) (1982) (emphasis added).

Thus, through a clause in subsection (a) and the introductory clause in subsection (b), Congress reinstituted a "results test" similar to the one applied in *White v. Regester*, 412 U.S. 755 (1973) ("*White*"). Although the results test removes the necessity of proving intent to establish a section 2 violation, its inclusion did not come without political compromise. *See Thornburg v. Gingles*, 106 S.Ct. 2752, 2764 (1986) ("*Gingles*") (at-large elections are not *per se* violations of section 2; vote dilution and lack of proportional representation alone do not violate section 2; and the results test does not assume the existence of racial bloc voting, which must be proved).

---

2 (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).

42 U.S.C. § 1973(a) (1982).

Congress, in the middle of subsection (b), attempted to ensure that protected members of the electorate are able to effectively participate in the political process, by electing representatives of their choice. Inclusion of the modifying phrase "representatives of their choice" is also the result of compromise. Congress accepted the context in which representatives was used by *White* (multi-member legislative districts for the Texas House of Representatives) and limited "representatives" to mean legislators. *See infra* at pp. 9-10.

Section 2 is the culmination of the give-and-take of the political process. Recognizing this, Congress admonished the courts, when construing and applying it, to take "a 'functional' view of the political process, and to conduct a searching and practical evaluation of reality." *Gingles*, 106 S.Ct. at 2775 (citations omitted). The reality here is that judges are not representatives.

Determination of whether certiorari should be granted turns solely on interpretation of the meaning of "representatives" in the 1982 Act: Did Congress intend to include elected state judges in the term "representatives?" The answer is found in the interplay between the addition of a results test and adoption of the limiting language from *White* .

II. The Shortcomings of the *Chisom* Court's Analysis

The *Chisom* court, in concluding that section 2(b) reaches elected state judges, employed a four-part analysis -- a plain language analysis, a legislative history analysis, a comparative analysis of section 5 of the Voting Rights Act with section 2, and an analysis which relied upon the Attorney General's interpretation of section 2. At each analytical juncture, the *Chisom* court took the wrong turn.

A. The Plain Language

Without much adornment, the *Chisom* court simply observed that the " ' "plain meaning of [the language in section 2] reaches all elections, including judicial elections" and that the pre-existing coverage of section 2 was not limited by the 1982 congressional amendments.' " *Chisom*, 839 F.2d at 1064 (brackets added by the court). Employing ordinary tools of statutory analysis suggest a different conclusion.

1. The Plain Meaning Rule

"The starting point in every case involving construction of a statute is the language itself." *Watt v. Alaska*, 451 U.S. 259, 265 (1981). If the words of a statute in their ordinary and common usage "convey a definite meaning, which involves no absurdity, . . . then that meaning . . . must be accepted" as the expression of Congress' legislative purpose. *Lake County v. Rollins*, 130 U.S. 662, 670 (1889). *See INS v. Cardoza Fonseca*, 107 S.Ct. 1207, 1213 (1987) ("*Cardoza*") (legislative purpose is expressed by the ordinary meaning of the words used); *Perrin v. United States*, 444 U.S. 37, 42 (1979) ("[U]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.").

Reference to the lexicon is one way to establish plain meaning. *See* R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES, 231 (1975) ("DICKERSON"). The lexicon contrasts, rather than equates, representatives and judges. A representative is "a person chosen by the people to represent their several interests in a legislative body," but a judge is a person "who presides in some court." BLACK'S LAW DICTIONARY 676 & 435 (abridged 5th ed. 1983). Individuals elected to the legislative branch represent the people whereas individuals elected to the judicial branch serve the people. *Holshouser v. Scott*, 335 F.Supp. 928 (M.D.N.C. 1971), *aff'd*, 409 U.S. 807

(1972). Congress itself, implicitly recognizing the representative-servant distinction, has never defined representative to include a judge,[3] but, consistent with common parlance, has defined representative as a legislator. *See* 46 U.S.C. § 1244 (representative is synonymous with a member of Congress which includes delegates to the House of Representatives from the District of Columbia, Guam, and the Virgin Islands). In an unguarded moment, the Fifth Circuit recently recognized, consistent with common parlance, that judges are not representatives. *See Hatten v. Rains*, 854 F.2d 687, 696 (5th Cir. 1988) ("*Hatten*") ("Judges, even if elected, do not serve a primarily representative function."); *Id.* at 696 (Garwood, J., joined by Jolly, J., specially concurring) ("[J]udges are not representatives."). Such unguarded statements, of course, speak volumes about the plain meaning of "representatives."

The difference between representatives and judges perhaps explains why Congress did not apply the results test of section 2 to elected judges. Representatives work as a body in which every protected class should have representation. The legitimacy of the work of a representative body depends on its inclusiveness. Judges, however, work alone to administer the law given them by the representative branch. *See Forrester v. White*, 108 S.Ct. 538, 544 (1988) ("The decided cases, however, suggest an intelligible distinction between judicial acts and the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform."). The legitimacy of a judge's work comes from election by the community as a whole and could be seriously undermined if the judge were elected from a single constituency.

A second way to establish plain meaning is to review the historical and cultural context of the language.

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3 *See, e.g.*, 15 U.S.C. § 381 (representative is not an independent contractor); 29 U.S.C. § 152 (representative means a person or labor union); 39 U.S.C. § 3005 (representative means an agent or representative acting as an individual); 45 U.S.C. § 151 (representative means a person or labor union).

DICKERSON at 105-11. Our national history treats a representative differently than a judge. The distinction between the representative and judicial branches -- a fundamental principle of both federal and state constitutional law, typically expressed in the separation of powers doctrine -- is a permanent cornerstone of our national jurisprudential ethos.

Wells v. Edwards, 347 F.Supp. 453, 454 (M.D. La. 1972), *aff'd mem.*, 409 U.S. 1095 (1973) ("*Wells*"), which held "that the concept of one-man, one-vote apportionment does not apply" to the judiciary, distinguished legislators from judges by focusing on the different governmental functions performed by each.

> Manifestly, judges . . . are not representatives in the same sense as are legislators or the executive. Their function is to administer the law, not to espouse the cause of a particular constituency.
>
> . . . .
>
> Judges do not represent people they serve people.

347 F.Supp. at 455. Congress' amendment of section 2 and use of "representatives" was against this backdrop of historical understanding.[4]

The term representative has an even more specific historical context. Congress purposely borrowed section 2(b)'s language containing the term representative from *White v. Regester*. *See* S. Rep. No. 417, 97th Cong., 2d Sess. 32, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 177, 210 ("In each case the courts looked to

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[4] The linguistic difference between representatives and judges is so great that the two terms can neither be considered identical nor does one include the other. *Cf. Cardoza*, 107 S.Ct. at 1213 ("The linguistic difference between the words 'well founded fear' and 'clear probability' may be as striking as that between a subjective and an objective frame of reference . . ."). *Cf. Burns v. Alcala*, 420 U.S. 575, 580-81 (1975) (dependent child does not include an unborn child because Congress used the word child to refer to an individual already born).

determine whether, in the words of both *White* [citation omitted] and the present committee amendment of section 2, the 'political processes' were 'equally open' and whether the members of the minority group had the same 'opportunity' as others in the electorate to 'participate in the political processes and to elect representatives of their choice.' "), ("S. Rep. 417").

In delineating the burden a plaintiff must sustain in order to prove that a multi-member district invidiously eliminates or minimizes the voting strength of protected racial groups specifically, *White* referred to the legislative branch:

> The plaintiffs' burden is to [show] . . . "that its members had less opportunity than did other residents in the district to participate in the political processes **and to elect legislators of their choice.**"

White, 412 U.S. at 766. Congress' transmutation of *White's* "legislators" into section 2(b)'s "representatives" is merely recognition that the two terms are synonymous and used interchangeably. *See Davis v. Bandemer*, 478 U.S. 109, 123 (1986); *Connor v. Finch*, 431 U.S. 407, 416 (1977).

Finally, any question about the plain-meaning of statutory language is conclusively settled where Congress knowingly borrows language that carries an established judicial interpretation. *See Rodriguez v. U.S.*, 107 S.Ct. 1391, 1393 (1987) ("*Rodriguez*") ("[I]n passing the CCCA, Congress acted -- as it is presumed to act -- with full awareness of the well established judicial interpretation . . .") (citations omitted). Congress' use of representatives, with the understanding that they are legislators as defined by *White*, directly supports the position that the plain meaning of representatives excludes judges.

2. The Clear Statement Rule

The clear statement doctrine, a second, equally powerful rule of construction, also governs the reading of section 2. This Court requires Congress, when passing legislation that "alter[s] the relationship between the States and the Nation," to expressly state its intention in unmistakable language in the statute itself. *Mitchum v. Foster*, 407 U.S. 225, 242 (1972); *see Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243 (1985) (Eleventh Amendment context). A state's sovereign interest in maintaining the integrity of its judicial system by selecting the method in which its judges will be chosen imposes on Congress the obligation to expressly and clearly state in unmistakable statutory language any intention to disrupt or regulate a state's choice.

Congress failed to express a clearly conceived intent in unmistakable language to alter the relationship between the states and the federal government and disrupt the states' choice in how their judges are chosen.

3. The Statutory Amendment Rule

Analysis of the structure of the language of subsection (b) also confirms that representatives do not include judges. Different terminology in the amendment of an act "indicates [congressional] intent to change the object of the legislation." *United States v. Dickerson*, 310 U.S. 544, 561 (1940). *Cf. Russello v. United States*, 464 U.S. 16, 23 (1983) (" 'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' ").

Congress' addition of a "results test" (making it easier for plaintiffs to prove a section 2 violation) along with the addition of "representatives" from *White* (which specifically referred to legislators) strongly indicates a change in the

manner in which section 2 operates to alleviate voting discrimination.

The *Chisom* court failed to grasp that, as Congress expanded the act to include a results test, it restricted the class of officeholders to whom such a test would apply. Ignoring the warning of *Rodriguez*, 107 S.Ct. at 1393, the *Chisom* court erroneously "and most impermissibly relied on its understanding of the broad purposes" of section 2 (safeguarding the voting rights of protected classes) to reach its conclusion that section 2 applies to state judges. Concurrently, other legislative considerations were at work, ultimately finding their embodiment in the term "representatives." Thus, the *Chisom* court's reliance on Congress' purpose in enacting section 2 in support of its plain language analysis is not persuasive, especially in light of section 2's language and its legislative history. *See Rodriguez*, 107 S.Ct. at 1393 (omissions and brackets by the Court) ("Where, as here, 'the language of a provision . . . is sufficiently clear in its context and not at odds with the legislative history, . . .' [there is no occasion] to examine the additional considerations of 'policy' . . . that may have influenced the lawmakers in their formulation of the statute.").

B. The Legislative History

Once the plain-meaning of the language of a statute settles the question of legislative intent, legislative history is reviewed "to determine only whether there is 'clearly expressed legislative intention' contrary to that language which would require [a court] to question the strong presumption that Congress expresses its intent through the language it chooses." *Cardoza, supra,* 107 S.Ct. at 1213 n.12. The plain-meaning presumption is so strong that "going behind the plain language of a statute in search of a possibly contrary congressional intent is 'a step to be taken cautiously' even under the best circumstances." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982).

A review of the legislative history concerning the 1982 Act reveals four salient points, each of which casts doubt on any congressional intent to apply section 2 to judges.

The 1982 Act was passed in response to *Bolden*, which concerned elected policy makers who sit as a body. The 1982 Act incorporated the standards and language of *White*, including the definition of a representative as a legislator. *See supra* pp. 9-10.

Section 5, which this Court has held to cover judicial elections, *see Haith*, *infra*, at p. 15, and section 2 are entirely different sections with entirely different purposes.[5] Indeed, the distinctions become critical in light of the fact that section 5 does not use the limiting term "representatives."

And finally, a review of the legislative history reveals that, the overwhelming bulk of the discussion involving the impact of section 2 never focused on whether the judiciary was to be included in the amendment. Whether the judicially untested idea that judges were to be covered by section 2 was a matter never seriously debated. Certainly, if Congress intended such a major intrusion into previously untouched state matters, "there would have been lengthy debate on this point." *Quern v. Jordan*, 440 U.S. 332, 343 (1979). There was no debate at all.

Nothing in the legislative history overcomes the plain language presumption. When the plain language of an act settles a question of statutory construction, as the plain language of section 2 does here, and when "nothing in the legislative history remotely suggests a congressional intent contrary to Congress' chosen words, . . . any further steps

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5 The subcommittee on the Constitution of the Senate Committee on the Judiciary, after substantial debate on the differences between section 2 and section 5, concluded that the omission from section 2 of language used in section 5 was "conspicuous and telling." The subcommittee, moreover, noted "the fact that Congress chose not to utilize language in section 2 that it expressly used in sections 4 and 5 (i.e., 'effects') to be far more persuasive of original congressional intent . . . ." SUBCOMM. ON THE CONSTITUTION OF THE SENATE COMM. ON THE JUDICIARY, 97TH CONG., 2D SESS., REPORT ON THE VOTING RIGHTS ACT 22, 23 (Comm. Print 1982).

take the courts out of the realm of interpretation and place them in the domain of legislation." *United States v. Locke*, 471 U.S. 84, 96 (1985). The court below, in interpreting section 2 to encompass judicial elections, stepped into the realm of legislation.

C. Senator Hatch's Comment

Senator Orrin Hatch, a leading opponent of the Act, commented in the Senate Report that a political subdivision "encompasses all governmental units, including city and county councils, school boards, *judicial districts*, utility districts, as well as state legislatures." *Chisom*, 839 F.2d at 1062 (citing S.Rep. 417) (emphasis by the court). The *Chisom* court over-exerts itself and treats Senator Hatch's comments as "persuasive evidence of congressional understanding and belief that section 2 applies to the judiciary." 839 F.2d at 1062. Giving such weight to so fine-grained a reading of the statement of one Senate opponent of a bill is outside even the expansive boundaries of statutory interpretation.

If Senator Hatch's comment was sincere, he misunderstood the words of the statute. Congress in subsection (b) employed "political subdivision" in the following manner: "The extent to which members of a protected class have been elected to office in the state or political subdivision is one circumstance which may be considered . . ." Political subdivision directly modifies "state," has no relation to "representatives," and relates to the totality of circumstances in the newly enacted "results test."

Senator Hatch's comment should be given little or no weight for two additional reasons. "The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history," *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979), and "speeches by opponents of legislation are entitled to relatively little weight in determining the meaning of the Act in question." *Holtzman v. Schlesinger*, 414 U.S. 1304, 1312 (1973).

This Court has warned that the colloquies of witnesses and even individual Congressman should seldom overcome the plain-meaning of the language in a statute. *Regan v. Wald*, 468 U.S. 222 (1984). Indeed, to allow the "clear statutory language to be materially altered by such colloquies, which often take place before the bill has achieved its final form, would open the door to the inadvertent, or perhaps even planned, undermining of the language actually voted on by Congress and signed into law by the President." *Id.* at 237. Giving weight to Senator Hatch's comment undermines the enacted and signed language of section 2.

D. Section 5 and Section 2

The *Chisom* court also mistakenly relies on *Haith v. Martin*, 618 F.Supp. 410 (E.D. N.C. 1985), *aff'd mem.*, 106 S.Ct. 3268 (1986) (*"Haith"*). *Haith* held that the preclearance requirement of section 5 of the Voting Rights Act applies to judicial election systems. The *Chisom* court misapplies *Haith* to support the proposition "that if section 5 applies to the judiciary, section 2 must also apply to the judiciary." 839 F.2d at 1064. The *Chisom* court relied on the "virtually identical" language defining the scope of section 2 and section 5 to reach its conclusion. 839 F.2d at 1064. Section 5, however, reads:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color . . . .

The *Chisom* court's comparison fails. Section 5 does not specifically, or even tacitly, condition its applicability to election systems pertaining to representatives, as does section 2. Section 5 offers no support for the *Chisom* court's section 2 analysis.

E. The Attorney General's Role

The *Chisom* court also inappropriately relies on the Attorney General's *amicus curiae* brief (in which he argued that the plain meaning of section 2 reaches judicial elections) as "persuasive evidence of the original congressional understanding of the Act." 839 F.2d at 1064.

In doing so, the Fifth Circuit misreads *United States v. Board of Commissioners of Sheffield*, 435 U.S. 110 (1978) (*"Sheffield"*), thereby according the Attorney General deference to which he is not entitled. In *Sheffield*, the Court held that "in light of the extensive role . . . Attorney General Katzenbach played in drafting the statute[,]" and his "key role in the formulation of the [1965 Voting Rights] Act," great deference should be given to his interpretation of the Act. *Id.* at 131-32. Attorney General Katzenbach was instrumental in attaining passage of the Act and wholly supportive of the purpose of the Act. Attorney General Meese, and his Justice Department, however, did not play any role in drafting the 1982 Act. Thus, there is no reason to accord the Attorney General's view special deference here.

Moreover, "[a] reviewing court 'must reject administrative constructions of [a] statute . . . that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement.' " *Securities Industry Ass'n v. Board of Governors of the Federal Reserve System*, 468 U.S. 137, 143 (1984). *Cf. Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority*, 464 U.S. 89, 97 (1983) ("[D]eference owed to an expert tribunal cannot be allowed to slip into judicial inertia which results in the unauthorized assumption by an agency of major policy decisions made by Congress."). The *Chisom* court's deference to the Attorney General's construction was inappropriate because the Justice Department did not play the role contemplated by *Sheffield* and because the Attorney General's construction frustrates Congress' intent.

III. Significant Protections Remain

Rejection of the *Chisom* court's holding would not leave minority voters unprotected in their exercise of the franchise, the fear of which may have silently crept into the Fifth Circuit's analysis.

First, and most obviously, Congress could react to a rejection by this Court of the *Chisom* holding just as surely and quickly as it did to this Court's *Bolden* decision. Given the earlier discussion about the need for Congress clearly to express its legislative intent to intrude into traditional state functions (such as judicial districting), *see* p. 11, *supra*, Congress should have an opportunity to debate this heretofore undebated issue. Such restraint seems a sound jurisprudential response to the problem being brought to the Court's attention.

Second, both the Constitution and the Voting Rights Act continue to offer significant protections to minority voters in connection with judicial elections. The Fifteenth Amendment still prohibits intentional acts of official racial discrimination against those seeking to exercise their franchise in judicial elections. *See Bolden*. In the *Chisom* case itself, for instance, proof of intentional discriminatory acts in the establishment of the at large judicial district being challenged still may succeed, notwithstanding this Court's rejection of the application of the results test to such judicial elections. The Voting Rights Act itself, as canvassed and found constitutionally valid in *Katzenbach*, contains a host of major protections for those seeking to exercise their franchise when electing judges. These protections include ballot access and, as held in *Haith, supra*, preclearance of various electoral changes involving judicial elections.

The availability of these protections highlights the extreme narrowness of the legal issue raised by *Chisom*. It does not involve a constitutional issue; reversing the Fifth Circuit would not permit intentional vote dilution in judicial races; and minority voters would still be entitled to a host of statutorily based ballot access protections. Whether

Congress in 1982 permitted the application of the results test to minority vote dilution claims in judicial elections is the only legal issue confronting the Court. It is a question in need of a final answer.

CONCLUSION

The Court need not await further developments and possible conflicts in the inferior federal courts. The issue is too straightforward to require it and too important to permit it. Instead, the Court should issue the requested writ of certiorari to settle this crucial issue.

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In The

Supreme Court of the United States

October Term, 1988

BUDDY ROEMER, *et al.*,
Petitioners,

vs.

RONALD CHISOM, *et al.*,
Respondents.

BRIEF OF THE STATE OF ALABAMA AND THE STATE OF MISSISSIPPI AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

In *Chisom v. Edwards,* 839 F.2d 1056 (5th Cir. 1988), a case arising in Louisiana, a panel of the Fifth Circuit Court of Appeals held that Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, as amended ("Section 2"), applies to state judicial elections. Similar litigation presenting a similar question is pending in at least six other states, including amici states Alabama and Mississippi. *See Mallory v. Eyrich,* 839 F.2d 275 (6th Cir. 1988) (Ohio) (on remand to the district court); *Southern Christian Leadership Conference of Alabama v. State of Alabama,* Civil Action No. 88-D-462-N (M.D. Ala.) (filed May 11, 1988) (Alabama); *Martin v. Mabus,* Civil Action No. J84-0708(B) (S.D. Miss.) (filed September 30, 1984), consolidated with *Kirksey v. Mabus,* Civil Action No. J85-0960(B) (S.D. Miss.) (filed October 17, 1985) (Mississippi), 658 F.Supp. 1183 (S.D. Miss. 1987); *McCray v. Mississippi State Board of Election Commissioners,* Civil Action No. DC 84-131-60-O (N.D. Miss.) (filed July 18, 1984) (Mississippi); *Brooks v. Glynn County Board of Elections,* Civil Action No. CV 288-146 (S.D. Ga.) (filed July 18, 1988) (Georgia); *Williams v. State Board of Elections,* Civil Action No. 88-C-2377 (N.D. Ill.) (filed March 22, 1988) (Illinois); *League of United Latin American Citizens v. Clements,* Civil Action No. MO-88-CA-154 (W.D. Tex.) (filed July 11, 1988) (Texas); *Rangel v. Mattox,* Civil Action No. B-88-053 (S.D. Tex.) (filed May 24, 1988) (Texas). Unless the United States Supreme Court grants this petition for certiorari and reviews and reverses the Fifth Circuit's incorrect ruling, these states—and others, as more new suits are filed—stand in immediate danger of sweeping federal court orders that would entirely restructure

state judicial election systems on untenable statutory grounds.

SUMMARY OF ARGUMENT

The Fifth Circuit erred in holding that Section 2 of the Voting Rights Act, as amended, applies to elections for state court judges. The court gave the wrong answer to this question because it consulted the wrong sources for guidance. Instead of concentrating on the congressional record—which is not enlightening on the question presented—the court of appeals should have looked principally to the vote dilution case law which the new statute was designed to codify. These cases make it clear that the federal courts' concept of vote dilution—which was expressly incorporated by amended Section 2—evolved entirely in the context of elections for *legislative* offices. In searching for the meaning of "representative" as used in amended Section 2, the court of appeals should have construed the word to mean the same thing as the word meant when it was used in those seminal vote dilution cases, i.e., as synonymous with "legislator." Judges are not "legislators" and therefore are not "representatives" within the meaning of Section 2.

There is another important reason to recognize that amended Section 2's vote dilution concept evolved in a legislative context: vote dilution is meaningful only in such a context. Once the Supreme Court fashioned protection against *individual* vote dilution by making the one person, one vote principle applicable to state *legislative* bodies, it was a short step to the concept of *minority* vote dilution. Subsequent cases made it clear that "fair rep-

resentation" involves two related propositions: "substantial equality" of every vote through the one person, one vote rule and, *assuming such equality*, the absence of dilution of minority voting strength. By making the second element dependent on the first, the courts simply recognized that, without the assumption of equality of voting shares generally, there is no theoretical basis for a claim of dilution of minority voting strength.

Contemporaneously with the development of this dual concept of fair representation, the Supreme Court agreed in *Wells v. Edwards* that the one person, one vote rule does *not* apply to elections of judges. In so doing, the Court decided *a fortiori* that the conceptually dependent notion of minority vote dilution has no field of operation in judicial elections.

The Court's decision in *Thornburg v. Gingles* reinforces this point. As Justice O'Connor observed there, dilution cannot be measured unless there is first a measure of "undiluted" minority voting strength. The dilution yardstick adopted in *Thornburg*—a calculation of the minority's potential voting strength in a single-member district system—obviously rests on the assumption that the one person, one vote rule applies and that each district has essentially equal population. In the absence of applicability of the one person, one vote rule, *Thornburg's* test is meaningless. Indeed, if one person, one vote does not apply, a state could *always* draw a district with a black majority. In such circumstances, there would be no judicially discernible and manageable standard for dealing with minority vote dilution claims. Consequently, such claims directed at judicial elections are simply not justiciable given the *Wells* decision. Since Congress was aware

of the *Wells* decision and cannot be presumed to have done a futile act, Congress did not mean for amended Section 2 to apply to judicial elections.

———o———

ARGUMENT

In *Chisom v. Edwards*, the Fifth Circuit panel simply made the wrong turn when it sought a way to decide whether Section 2 applies to elections of state judges. Faced with the fact that Section 2 does not itself speak directly to the subject of judicial elections, the panel went to other parts of the Act and to legislative history for guidance. But after painstakingly sifting through the hundreds of pages of hearings, reports and comments on the amended Act, the Court retrieved only fragile shards of evidence to confirm any kind of Congressional consensus on minority vote dilution in judicial elections. That evidence is in fact either too diffuse (e.g., the broad remedial purpose of the entire Act, or general definitions of the words "voting" and "vote" in another section of the Act) or too incidental (e.g., a single reference to "judicial districts" by a single Senator opposed to amendment, or scattered listings of minority judges in statistical charts and tables) to be useful.

In all candor, Section 2's language and its legislative history remain intractably silent on the specific question of the applicability of Section 2 to judicial elections. However, the legislative history *is* clear on one crucial point: When Congress amended Section 2 in 1982 its primary intention was to codify certain case law on vote dilution. The *Chisom* court itself made this observation:

> [T]he language added by Congress in subsection (b)—"to participate in the political process and to elect representatives of their choice"—is derived almost verbatim from the Supreme Court's standard governing claims of vote dilution on the basis of race set forth in *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), prior to *Mobile v. Bolden* [446 U.S. 55 (1980)]. *See* S. Rep. No. 417, 97th Cong., 2d *Sess.* 27, *reprinted in* 1982 U.S. Code Cong. & Admin. News 117, 205 (Congress' stated purpose in adding subsection (b) was to "embod[y] the test laid down by the Supreme Court in *White*.")

Chisom, 839 F.2d at 1062. Similarly, this Court has repeatedly recognized Congress' chief reason for amending Section 2. *See Thornburg v. Gingles*, 478 U.S. 30, 35, 92 L.Ed.2d 25, 37 (1986) ("Congress substantially revised § 2 . . . to establish as the relevant legal standard" the results test applied in *White* and other pre-*Bolden cases*); *id.* at 83, 68 (O'Connor, J., concurring) ("[a]mended § 2 is intended to codify the 'results' test employed in *Whitcomb v. Chavis*, 403 U.S. 124 [1971]" and *White*).

But the Fifth Circuit panel completely missed the implication of this point. In fact, the question of whether Section 2 extends to judicial elections needed—and continues to need—no further gloss than that already available to Congress in the pre-*Bolden* case law at the time of the 1982 amendments. Well-established rules of statutory construction explicitly direct courts to examine such case law itself for guidance where a statute codifies that law. *See* Sutherland Stat. Const. § 48.03 (4th Ed.) (1984) ("[t]he pertinent court decisions may be consulted in the interpretation of statutes which restate decisional law"); *id.* at § 50.02 ("[w]here a statute attempts to restate the

existing common law, the latter becomes an especially important factor in determining legislative intent"). Thus, it was to the pre-*Bolden* vote dilution cases that the Fifth Circuit panel should have turned to determine whether Section 2 is meant to apply to judges.

Of course, neither *White* nor *Whitcomb* nor *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc)—the key cases on minority vote dilution prior to 1980—expressly discusses judicial elections. But that is precisely the point. *Whitcomb* presented an attack on Indiana's scheme of state legislative apportionment into multi-member districts. *White* involved a challenge to legislative reapportionment in the Texas House of Representatives. *Zimmer* was a suit for reapportionment of the school board and police juries in a rural Louisiana parish. In other words, the courts' concept of vote dilution evolved entirely in a *legislative* setting.

This fact is relevant for several reasons. First, appellants and appellees have engaged in a vigorous dispute about the meaning of the word "representative" as it is used in amended Section 2:

> A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect *representatives* of their choice. [Emphasis added.]

The Fifth Circuit resolved this disagreement on the side of the appellants' argument that "representative" means

nothing more specific than "official" or "candidate" by examining the Senate Report on the 1982 amendments and declaring that these terms are used interchangeably there. *See Chisom*, 839 F.2d at 1063. Again, the appeals court consulted the wrong source. Section (b), quoted above, is lifted essentially verbatim from *Whitcomb*, 403 U.S. at 149-50, and *White*, 412 U.S. at 766, and the proper context in which to assess the meaning of "representative" is not the Senate Report, which offers little relevant guidance, but the decisional law that Congress read, considered and meant to invoke and replicate in amending Section 2. In *Whitcomb* and *White*, the significant words that the Court uses interchangeably are not "representative" and "candidate" or "official," but "representative" and "*legislator*." There is no support whatsoever in these cases for the circuit court's apparent view that a *judge* is obviously a "representative" for purposes of Section 2.

But there is a second and more important reason for this Court to recognize that the concept of minority vote dilution codified in Section 2 evolved in a legislative context. The crucial point is that minority vote dilution is meaningful *only* in such a context. In 1964, this Court held in *Reynolds v. Sims*, 377 U.S. 533 (1964), that the Fourteenth Amendment requires state legislatures to apportion themselves by population. The touchstone by which the courts were henceforth to test apportionment was the "easily demonstrable" rule of one person, one vote. *Id.* at 559-60. This rule meant that legislative districts had to be of roughly equal population so that courts could enforce each individual's right to an equal mathematical "share" of representation or, in the words of a companion case to *Reynolds*, "an equally weighted vote." *Lucas v.*

Forty-Fourth General Assembly, 377 U.S. 713, 736 (1964). Vote dilution occurred when an individual enjoyed something less than his or her proportionate voting strength.

It was a short step from the notion of individual vote dilution developed in *Reynolds* and its progeny to the concept of *minority* vote dilution established in *Whitcomb*, *White*, and *Zimmer*. If each individual owned a quantifiable share of representation, then a given group should wield the aggregate voting strength of its individual members. In *Zimmer*, the conceptual link between these two kinds of vote dilution was made explicit:

> Inherent in the concept of fair representation are two propositions: first, that in apportionment schemes, one man's vote should equal another man's vote as nearly as practicable; and second, that *assuming substantial equality*, the scheme must not operate to minimize or cancel out the voting strength of racial elements of the voting population.

Zimmer, 485 F.2d at 1303 (emphasis added). The key phrase here is "assuming substantial equality." For *without* the assumption of substantial equality among voting shares made possible by the one person, one vote rule, no aggregate measure of minority voting strength—and therefore no measure of dilution of that strength—is conceivable.

Hence, the significance of *Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972) (three judge court), *aff'd mem.*, 409 U.S. 1095 (1973), in the debate over whether Section 2 may coherently be applied to judicial elections. At precisely the time at which the Court was evolving the dual concept of fair representation summarized in *Zimmer*, the *Wells* case decided that the fair representation mandates

do not apply to judges. *Accord Holshouser v. Scott*, 335 F.Supp. 928 (M.D.N.C. 1971) (three judge court), *aff'd mem.*, 409 U.S. 807 (1972). It is true that no specific charge of minority vote dilution was before the Court in *Wells*. But once the Court determined that the one person, one vote rule did not apply to the judiciary, it decided *a fortiori* that the conceptually dependent notion of minority vote dilution—later codified in Section 2—had no field of operation in judicial elections.

Thornburg v. Gingles, the Court's definitive exegesis of Section 2 vote dilution, sharpens this point. In her concurring opinion, Justice O'Connor notes that "[i]n order to evaluate a claim that a particular multimember district or single-member district has diluted the minority group's voting strength to a degree that violates § 2 . . . it is . . . necessary to construct a measure of 'undiluted' minority voting strength." *Thornburg*, 478 U.S. at 88, 92 L.Ed.2d at 71 (O'Connor, J., concurring). There is no doubt that the yardstick adopted by the *Thornburg* Court—a calculation of the minority's potential voting strength in a single-member district system—rests on the assumption that the one person, one vote rule applies and that each district has roughly the some population. *See* 478 U.S. at 50-51 n.17, 89-90, 92 L.Ed.2d at 46-47 n.17, 72. Otherwise, to paraphrase Justice Harlan, the court would be unable even to measure what it purports to equalize. *Whitcomb*, 403 U.S. at 169 (Harlan, J., separate opinion).

Without the measure of individual voting strength provided in legislative cases by the one person, one vote rule, *Thornburg's* test is meaningless in the judicial context. Since, under *Wells*, state judicial districts need not

be equal in size, a state could *always* theoretically draw a district in which blacks constitute a voting majority by reducing the total population in that district. Indeed, there is, effectively, no "judicially discernible and manageable standard" by which a court could find that a given voting system does *not* dilute minority voting strength if Section 2 applies to judges—and, thus, minority vote dilution claims are simply not justiciable given the *Wells* ruling. *See Davis v. Bandemer,* 478 U.S. 109, 122-23, 92 L.Ed.2d 85, 99 (1986); *Baker v. Carr,* 369 U.S. 186, 217 (1962). Since it cannot be presumed that Congress would do a futile thing, Sutherland Stat. Const. § 45.12 (4th Ed.) (1984), and it *can* be presumed that Congress was aware of existing judicial decisions such as *Wells* when it amended Section 2, *id.; Director, OWCP v. Perini North River Associates,* 459 U.S. 297, 319-20 (1983), the *Chisom* court was incorrect in concluding that Congress meant for Section 2 to apply to the judiciary.

Haith v. Martin, 618 F.Supp. 410 (E.D.N.C. 1985) (three judge court), *aff'd mem.,* 477 U.S. 901 (1986), in which this Court summarily upheld a district court decision that Section 5 of the Voting Rights Act does apply to judicial elections, does not alter this conclusion. Section 5's non-retrogression standard, *see Beer v. United States,* 425 U.S. 130 (1976), is coherent independently of the one person, one vote rule. That is to say, Section 5 does not call for a court or the Attorney General to measure an existing voting system against an ideal voting system in which districts are assumed to be of equal population. Rather, Section 5 requires only an assessment of the effect of a *change* from one system to another, without reference to any ideal measure of voting strength. Thus,

Haith provides little guidance of relevance to the *Chisom* case.

In summary, this Court in *Wells* declined to enter the "political thicket" by imposing its one person, one vote rule for legislative apportionment on judicial districting. Once that decision was made, it followed that the Court—and by extension, Congress—accepted the risk that not only would individuals have no actionable claim of vote dilution in cases of judicial malapportionment under *Wells*, but, absent intentional discrimination, groups would also enjoy no cause of action specifically arising from their failure to receive less than their aggregate mathematical share of voting strength in electing judges.

But the Court and Congress also created the corollary possibility that individuals and groups might secure *more* than their share of voting strength, giving states, in the words of Justice Stewart, the "opportunity for enlightened and progressive innovation in the design of its democratic institutions" to protect the minority from the domination of the majority. *Lucas*, 377 U.S. at 748-49 (Stewart, J., dissenting). Thus, for example, residents in Alabama's 26th Judicial Circuit, which is nearly 40 percent black, elect one judge for every 23,679 persons—arguably wielding more voting strength than residents in Alabama's 94 percent white 30th Judicial Circuit, where residents elect one judge per 38,834 persons.

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CONCLUSION

In short, Congress weighed the alternatives in amending Section 2 and determined to regulate legislative, but not judicial, elections. This Court should not permit the Fifth Circuit panel's misguided ruling in *Chisom* to upset that delicate balance. The requested writ of certiorari should issue, and this Court should reverse the Fifth Circuit panel's decision.

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